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THE INDIAN LAW REPORTS. CALCUTTA SERIES,

CONTAINING
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CORRIGENDA.

- Page 61, for "J. E. D. Enra" read "Enra."
- Page 317, Head note, for "247" read "S. 247."
- Page 420, line 1, for "offeco" read "offence."
- Page 421, (Head note) line 3, for "it" read "is."
- Page 421, (Head note) line 9, for "brought" read "bought."
- Page 483, line 4, for "embankment" read "embankment."
- Page 502, line 16, for "what" read "that."
- Page 504, line 18, for "as fact" read "as a fact."
- Page 512, line 12, for "is" read "are."
- Page 520, line 13, for "somewhere" read "something."
- Page 606, last line, for "be the property" read "the property."
- Page 632, last line (ref.), for "3 Sn." read "3 Sw."
- Page 783, (Head note) line 2, for "1879" read "1877."
- Page 790, (Head note), for "(XV of 1887)" read "(XV of 1877)."
- Page 935, lines 1 and 2, for "J. G. Woodroffe" read "Pugh."
- Page 979, (Head note) line 7, for "Chatterjee (1)" read "Chatterjee (2)."
- Page 979, (Do.) line 8, for "Das(2)" read "Das(3)."
- Page 986, line 4 (from bottom), for "His" read "his."
- Page 1044, (Head note) line 5, for "if" read "of."
- Page 1046, line 3, for "1899" read "1889."
- Page 1050, line 17 (from bottom), for "1899" read "1889."
- Page 1051, line 4 (from bottom), for "1900" read "1890."

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THE INDIAN LAW REPORTS

Calcutta Series.

APPELLATE CIVIL

SHEORUTTON SINGH

v.

NET LOLL SAHU.*

1903

April 23, 23
of May 4, 6.

Sale—Revenue—Suit—Act XI of 1859, ss. 5, 6, 7, 33—Bengal Act VII of 1868, s. 8—Certificate of sale—Onus of proof—Notice—Irregularity and illegality in form and service—Bengal Cess Act (IX of 1880) s. 52—Evidence Act (I of 1872) s. 114, cl. (e)—Presumption—Regulation VIII of 1819, ss. 8, 14.

In a suit to set aside a sale for arrears of revenue, the onus of proving that there has been irregularity or illegality in the preparation, service or posting of notice rests on the person who seeks to have the sale set aside.

Ashonullah Khan Bahadur v. Trilochan Bagchi(1) and *Harro Doyal Roy Chowdhry v. Mahomed Gazi Chowdhry*(2) distinguished.

The fact that the inadequacy of price fetched at the sale was the result of the irregularity complained of may be either established by direct evidence or inferred, when such inference is reasonable, from the nature of the irregularity and the extent of the inadequacy of price.

In a sale for arrears of revenue, after the certificate of title has been issued to the purchaser, s. 8 of Bengal Act VII of 1868 will operate as a bar to a suit to set aside the sale on the ground of irregularity in serving and posting notices under s. 6 of Act XI of 1859.

* Appeal from Original Decree No. 9 of 1899, against the decrees of Babu Hara Krishna Chatterjee, Subordinate Judge of Arrah, dated the 29th of July 1898.

(1) (1886) I. L. R. 18 Calc. 197.

(2) (1891) I. L. R. 19 Calc. 699.

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SHEORUTTON
SINGH
v.
NET LOLL
SAHU.

Lala Mobaruk Lal v. The Secretary of State for India in Council(1) and *Bal Mokoond Lall v. Jirju Dhun Roy*(2) distinguished.

Omission to serve notice under s. 7 of Act XI of 1859 can hardly render a sale for arrears of revenue liable to be annulled under s. 83 of that Act, especially after issue of the certificate of title to the purchaser.

Gobind Chundra Gangopadhyay v. Sherajunnissa Bibi(3) and *Mahomed Azhar v. Raj Chunder Roy*(4) referred to.

THE plaintiffs, Sheorutton Singh and others, appealed to the High Court.

The suit was brought to set aside a revenue sale. The estate sold was taluka Nurpore Mujhowli, tauji No. 509, bearing Government revenue of Rs. 880-12-5, and belonged to the plaintiffs and defendants Nos. 4 to 8. The sale was held on the 7th September 1896 for default of the March kist of that year, and the property was purchased by the defendants Nos. 1 to 3 for Rs. 1,200.

The plaintiffs alleged that the defendants Nos. 4 to 8, who had only a very small share in the estate, amounting to 1 anna and 5½ pies and odd, did not pay the revenue in respect of their share for the March kist of 1896, amounting to Rs. 17-12-0, with a view to injure the plaintiffs, who owned 14 annas 6 pies and odd of the estate, and that they, acting in collusion and concert with the other defendants (Nos. 1 to 3), did not allow the plaintiffs to know anything of the default they had deliberately made, and thus brought about the sale of the entire estate, although the plaintiffs had paid up the arrears due on their share. It was further alleged that (a) under certain circumstances set out in the plaint, it was necessary to serve notice under s. 5 of Act XI of 1859, but that was not done; (b) the sale proclamation was not issued and served in accordance with law; (c) notices under ss. 6 and 7 of Act XI of 1859 were not drawn up according to law; (d) notice under s. 7 was not served; and (e) defendants Nos. 4 to 8, acting in collusion with defendants Nos. 1 to 3, prevented intending purchasers from bidding at the sale, and thus caused the estate, which was worth Rs. 15,000, to be sold at a very low price.

(1) (1885) I. L. R. 11 Calc. 200.

(2) (1882) I. L. R. 9 Calc. 271.

(3) (1882) 13 C. L. R. 1.

(4) (1898) I. L. R. 21 Calc. 354.

The defendants Nos. 1 to 3 denied the said allegations about irregularities, fraud, and collusion, and, amongst other contentions, pleaded that the suit could not proceed in view of s. 8 of Bengal Act VII of 1868. It appears that the sale certificate was issued to the defendant No. 1, whose name appeared on the bid-paper, on the 23rd February 1897.

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The present suit was instituted on the 24th January 1898.

The Subordinate Judge dismissed the suit.

The 'Advocate-General (Mr. J. T. Woodroffe) and Babu Kalikrishna Sen for the appellants.

Babus Saligram Singh and Makhan Lal for the respondent.

Our. adv. vult. .

BRETT AND MITRA JJ. The plaintiffs were proprietors of a 14 annas 6 pies' odd share in taluka Nurpore Mujhowli, pargana Arrah, tauji No. 509, and defendants 4 to 8 were proprietors of the remaining 1 anna 5½ pies' odd share. Prior to 1896 the plaintiffs had applied to have a separate account opened in respect of their share, but their prayer had not been granted. On the 7th September 1896 this estate was put up for sale for arrears of Government revenue due on the March kist for 1896, amounting to Rs. 17-12, and was purchased for Rs. 1,200 by defendants 1 to 3. Plaintiffs appealed to the Commissioner, but their appeal was dismissed on the 30th January 1897, and on the 10th March 1897 possession was delivered to defendants 1 to 3, the sale certificate having been issued to them on the 23rd February 1897.

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May 6.

This suit was instituted on the 24th January 1898 to have the sale set aside as invalid and irregular on the following grounds:—

- (1) that the proprietary right to 2 annas of the plaintiff Lachminarayan was under attachment in execution of a decree obtained against him by Baijnath Sahai, of which notice had been given to the Collector, and as the attachment was in force at the time of sale, a notice should have been served under s. 5 of the Act, but this was not done;

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- (2) that the notices under ss. 6 and 7 of the Act XI of 1859 were not drawn up according to the provisions of the law ;
- (3) that notice under s. 7 was not served ;
- (4) that the sale proclamation was not issued and posted in the Collector's Court and in the Court of the District Judge according to the provisions of the law, but that the proceedings were taken clandestinely and fraudulently ;
- (5) that defendants 4 to 8 were in collusion with the purchasers, allowing the property to be sold at an inadequate price and dissuading intending purchasers from bidding at the sale ; and
- (6) the property was alleged to be worth Rs. 15,000 to Rs. 20,000 with a Government revenue of Rs. 880-12, and it was sold at the very inadequate price of Rs. 1,200 in consequence of the irregularities.

The plaintiffs alleged that they had paid up the full arrears due on their share, and the arrears for which the estate was sold were due from their co-sharers, defendants 4 to 8.

The defendants denied all the irregularities alleged by the plaintiffs, and further relied on the provisions of s. 33 of Act XI of 1859 and contended that the plaintiffs had not suffered substantial loss by reason of the property being sold at an inadequate price, and that they were bound to prove, if they had suffered loss, that it was the result of the irregularities. They also relied on the provisions of s. 8 of Act VII (B. C.) of 1868 as a bar to the present suit, on the ground that the sale certificate issued to them was conclusive evidence that all notices in or by Act XI of 1859 required to be served and posted had been duly served and posted.

There was a further plea that the interests of plaintiffs Nos. 1, 3, and 4 in the property had been sold for arrears of cesses before the sale for arrears of revenue and purchased by Mukhtear Abdul Hossein and Nur Ahmed Ali ; and that as they had withdrawn their share of the sale-proceeds, the suit so far as those plaintiffs were concerned was barred by s. 33 of Act XI of 1859.

The Subordinate Judge overruled the last objection, holding that the two persons were merely speculative and sham purchasers, who had no real interest in the property. 1903
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He held that the plaintiffs had failed to give any evidence to prove that at the time of the sale there was any order of attachment of any Civil Court actually subsisting.

He found that the notices as required by s. 6 of Act XI of 1859 had been duly issued and posted; that the plaintiffs had failed to prove that the notices required by s. 7 of the Act had not been duly served and posted; and even if they had not, then no injury could have resulted to the plaintiffs from the omission: see *Gobind Chunder Gangopadhya v. Sherajunnissa Bibi*(1).

He further held that the plaintiffs had failed to prove inadequacy of price by omitting to produce their collection papers, or that the lowness of the price was attributable to any irregularity in publishing or conducting the sale. He found that the plaintiffs had failed to prove that the sale had been brought about by the fraud of their co-sharers, and, if it had been, then the plaintiffs' remedy against them was by suit for damages under the proviso to s. 33 of the Act. He relied on the case of *Gobind Chunder Gangopadhya v. Sherajunnissa Bibi*(1) as an authority for holding that, even if the purchasers with the co-sharer defendants dissuaded other persons from bidding at the sale, such conduct would not amount to fraud. And, lastly, he held that the provisions of s. 8 of Act VII (B. C.) of 1868 were a bar to the plaintiff's success in the present case, the suit having, moreover, been instituted on the 24th January 1898—nearly a year after the sale certificate had been issued. He accordingly dismissed the suit with costs. Plaintiffs have appealed.

The grounds taken in support of the appeal are substantially the same as those on which the suit was brought in the Lower Court. The objection to the sale, based on the ground that no notice was issued under s. 5 of Act XI of 1859, has not been pressed, as there appears to be no evidence to support it. It has been contended that there were irregularities in the preparation and publication of the notices under ss. 6 and 7 of Act XI

(1) (1882) 13 C. L. B. 1.

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of 1859; that the property was sold for an inadequate price, and that the inadequacy of the price was due to the irregularities. On the other hand, it is denied on behalf of the respondents that there were any irregularities; but if there were, it is argued that after the issue of the sale certificate to the purchasers, no objection to the sale on the ground of any omission in the posting and serving of notices under ss. 6 and 7 of the Act can be sustained. The plea has also been supported, though in a rather a half-hearted way, that, owing to the previous sale of the shares of plaintiffs Nos. 1, 3, and 4 in the property for arrears of road cess and the purchase of those shares by the mukhtear, Abdul Hossein, and Nur Ahmed Ali, and to the fact that they have withdrawn their share of the present purchase-money, it is not open under s. 33 of Act XI of 1859 to plaintiffs Nos. 1, 3, and 4 to join in bringing the suit.

Taking the last point first, we agree with the Subordinate Judge that there is not much substance in the plea. From the papers on the record it would seem that on the 20th July 1896 the interests of certain persons described as debtors in Nurpore Mujhowli, pargana Arrah (no tauji number being given), were sold for arrears of road cess, amounting to Rs. 15-4, and were purchased by Abdul Hossein, mukhtear, for Rs. 55. On the 1st February 1898, Abdul Hossein and Nur Ahmed Ali were registered in respect of shares of 2 annas 11 pies each in mehal Nurpore Mujhowli, pargana Arrah, tauji No. 509, and Sat Narain Singh, Dhonukdhari Singh, and Sheorutton Singh (the plaintiffs in question) were each registered in respect of $\frac{2}{3}$ ths of a pie share in the same estate. This order for registration was passed *ex parte*, and it is remarkable that it was passed nearly $1\frac{1}{2}$ years after the entire interest in the mehal had been sold for arrears of Government revenue to the present defendants Nos. 1 to 3, and that four days afterwards, *viz.*, on the 5th February 1898, these same persons, Abdul Hossein mukhtear and Nur Ahmed Ali, applied to withdraw their share of the sale-proceeds under the last-mentioned sale. The present suit was instituted on the 24th January 1898—more than a week before the registration of the names of Abdul Hossein and Nur Ahmed Ali as proprietors and 11 days before they applied to withdraw what they said was their share of the

sale-proceeds. The provisions of s. 33 of Act XI of 1859 could not under these circumstances be a bar to the present suit. The omission of Abdul Hossein and Nur Ahmed Ali to take any steps to have their names registered until after the institution of this suit and their entire want of interest in the property which they were supposed to have purchased at the sale for arrears of cess would seem to indicate that their original purchase was purely speculative and to raise a strong suspicion of some understanding existing between them and the present defendants Nos. 1 to 3.

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The plaintiffs deny that the notices required by s. 7 of Act XI of 1859 were served in the locality, and to prove this one of the plaintiffs has given evidence, and they have examined Bikoo Lal, Basawan Chamar, and Pergash Chowkidar (who appear on the return of the notice as attesting witnesses of the service) to prove that no such notice was served, and that they were not witnesses to its service. On the same point they have also examined Thakur Lal, who, they say, is the real patwari and not Bikoo (as incorrectly described in the return to the notice), and Nandan Singh, the malik of a share separated from theirs in Nurpore. The defendants have examined their *mitsuddi*, Narain Lal, to swear to the publication of the notice. The Subordinate Judge is inclined to believe that the three witnesses to the service of the notice have been gained over by the plaintiffs, as he is unable to believe that the defendants, the purchasers, could have induced the process-server to submit a false return before they had any interest in the village. Judging, however, from other transactions in connection with this estate, which appear from the evidence to have taken place in the Collectorate, it does not appear to us to be safe to place too much reliance on the return. It is not, however, of much real importance to decide whether the plaintiffs have proved that these notices under s. 7 were not duly served, as it would be hardly possible, as pointed out in *Gobind Chunder Gangopadhyaya v. Sherajunnissa Bibi*(1) and followed in *Mahomed Azhar v. Raj Chunder Roy*(2) and in *Azimuddin Patwari v. The Secretary of State for India*(3), to prove that the omission to serve

(1) (1882) 13 C. L. R. 1.

(2) (1898) I. L. R. 21 Calc. 354.

(3) (1898) I. L. R. 21 Calc. 360.

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the notice under s. 7, the only object of which was to prevent the tenants from paying rents to the defaulting proprietors, could in any way affect the price which intending bidders would offer for the property; and in the present case, even accepting that the omission to serve the notice and the inadequacy of price are established, the plaintiffs cannot be held to have proved that the latter was the result of the former. It would further appear that there is authority to support the view that, after the issue of the sale certificate to the purchasers, the provisions of s. 8 of Act VII (B. C.) of 1868 would bar the plaintiffs from raising in this suit the question, whether the notices under s. 7 of Act XI of 1859 were duly posted and served.

The questions which remain for consideration are whether the plaintiffs have made out a case that the notices required by s. 6 of Act XI of 1859 were not issued in correct form and were not duly posted; whether the property was sold for an inadequate price, and whether the plaintiffs have established their case that the inadequacy of the price was the result of the irregularity.

Taking the question of price first, we think that the plaintiffs have by their evidence proved that the price, *viz.*, Rs. 1,200, for which their property was sold, is an inadequate price. The Subordinate Judge was not satisfied that the price fetched was inadequate, and he based his conclusion apparently on the fact that the plaintiffs have failed to produce their collection papers; that the deeds of sale showing the prices at which other separated shares in the same village were sold in the last ten years are not documents on which he can rely for the purpose of determining the value of the plaintiffs' property, as the land in the plaintiffs' share is not proved to be equal in quality to the land in the other shares, and because one witness, Narain Lall, has deposed that the plaintiffs' property was seriously damaged by inundation in the last eight or nine years. We are not, however, inclined to place the same reliance as the Subordinate Judge has placed on the evidence of Narain Lall. It is true he was in the service of the plaintiffs in Nurpore, but since the sale to the defendants Nos. 1 to 3 he has entered their service, and his evidence shows that he is their strongest partisan. He would even suggest that the property realised at the sale more than its value. On the other hand, we think that

the fact that the Government revenue assessed on the property was Rs. 880-12 is strong evidence to show that the value of the estate was much over Rs. 1,200. We also do not agree with the Subordinate Judge that the deeds produced by the plaintiffs to prove instances in which other shares in the same estate have been sold are not good evidence to indicate the value of the plaintiffs' property. The plaintiffs' witness, Nandan Singh, a co-sharer, says the patti sold and his patti are of the same quality, and that he was prepared to bid up to Rs. 10,000 or Rs. 12,000 for the plaintiffs' estate. Other witnesses assess the value of the property at the same figure, and the deeds produced by the plaintiffs fully support their case that Rs. 1,200 was a very inadequate price for the estate. We cannot, therefore, agree with the finding of the Subordinate Judge on this point, but hold that the property of the plaintiffs was sold at a very inadequate price of Rs. 1,200, its real value being from Rs. 10,000 to Rs. 15,000.

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It has been argued for the respondents that, even if the price of the property was inadequate, it rested on the plaintiff to prove by direct evidence that such inadequacy of price was the result of the irregularity. It has, however, been held by the Full Bench of this Court in *Lala Mobaruk Lal v. The Secretary of State for India*(1) that the Privy Council did not intend to lay down any general rule in all cases in *Macnaghten v. Mahabir Pershad Singh* (2), and that the question was rather one of fact than of law; and in a series of cases since disposed of by this Court, it has been held that the fact that the inadequacy of the price is the result of the irregularity may either be established by direct evidence or be inferred, where such inference is reasonable, from the nature of the irregularity and the extent of the inadequacy of price—*Gur Buksh Lall v. Jawahir Singh*(3), *Surnomoyee Debi v. Dakhina Ranjan Sanyal*(4), *Saadatmand Khan v. Phul Kuar*(5), *Jamini Mohan Nundy v. Chandra Kumar Roy*(6) and *Bhikari Misra v. Surja Moni Pat Maha Dai*(7). The question therefore will be whether, if the irregularity has been proved in this case,

(1) (1885) I. L. R. 11 Calc. 200.

(4) (1896) I. L. R. 24 Calc. 291.

(2) (1882) I. L. R. 9 Calc. 656.

(5) (1898) I. L. R. 20 All. 412.

(3) (1893) I. L. R. 20 Calc. 699.

(6) (1901) 6 C. W. N. 44.

(7) (1901) 6 C. W. N. 48.

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the facts established by the plaintiffs are such as either go directly to prove that the inadequacy of price was the result of such irregularity or such as to raise the reasonable inference that it was the result.

It has next been contended on behalf of the respondents that s. 8 of Act VII (B. C.) of 1868 is a bar to the present suit, and that after the issue of the sale certificate to the defendants, it is not open to the plaintiffs to contest that the notices required by s. 6 of Act XI of 1859 were not duly served and posted. In opposition to this contention reliance is placed on behalf of the appellants on the Full Bench case of *Lala Mobaruk Lal v. The Secretary of State for India*(1), in which it was held by a majority of the Judges that a non-compliance with the provisions of s. 6 of Act XI of 1859 is not a mere irregularity and is not one of those errors in procedure which are intended to be cured by s. 8 of Act VII (B. C.) of 1868. In that case the non-compliance with the provisions of s. 6 of Act XI of 1859 consisted in the fact that the date fixed for the sale in the notice was less than 30 days from the date of the affixing of the notice, and this was held to avoid the sale and not to be a defect which could be cured by the provisions of s. 8 of Act VII (B. C.) of 1868. This was not an error in the service or posting of the notice, but a defect in the notice itself, and in delivering judgment in that case Mitter J., after holding that the sale was null and void because it could not have been held in accordance with the provisions of Act XI of 1859, remarked : " If it was null and void, s. 8 of Act VII (B.C.) of 1868 would not make it valid on the ground that the purchaser has obtained his certificate. This section only cures the defects, if there be any, in the procedure to be observed regarding the service and posting of the notices required to be served and posted under the Act." Nor does the previous case of *Bal Mokoond Lal v. Jirju Dhur Roy*(2) go further than this. In that case it was held that s. 8 of Act VII of 1868 merely renders it unnecessary to call evidence to show that the notice itself had been posted, and it is still necessary to show that the contents of the notice are such as are required by s. 6 of Act XI of 1859.

(1) (1885) I. L. R. 11 Calc. 200.

(2) (1892) I. L. R. 9 Calc. 271.

In the case of *Gobind Lal Roy v. Ram Janam Misser* (1) the Privy Council have held that the provisions of s. 33 of Act XI of 1859 apply as well to an illegality as to an irregularity, and that such illegality must be declared and specified in the appeal to the Commissioner.

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In the present case the irregularity in the service and posting of the notice was one of the grounds taken in the appeal to the Commissioner.

The learned Advocate-General has argued that the non-compliance with the provisions of s. 6 of Act XI of 1859 in this case amounted to an illegality and not merely to an irregularity, and his argument has proceeded on the following lines. He has referred us to the cases of *Ashamullah v. Trilochan Bagchi* (2) and *Hurro Doyal Roy Chowdhry v. Mahomed Gasi Chowdhry* (3). The first was a suit for recovery of cesses against certain persons in respect of a lakhiraj tenure, and it was held that the landlord was bound to prove the service of the notice under s. 52 of the Road Cess Act, and that the presumption of s. 114, clause (e) of the Evidence Act did not apply. The following remark of Mitter J. in delivering judgment is relied on: "Where under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that that liability has been incurred to prove that the things prescribed by the Act have been actually done." The second was the case of a sale of a patni taluq held under Regulation VIII of 1819, and it was there decided that failure on the part of the zamindar to prove due publication of the notices required by s. 8 of the Regulation was a sufficient ground for setting aside the sale under the terms of s. 14 of the same Regulation. The learned Advocate-General has argued that the case of a sale of an estate for arrears of Government revenue is analogous to these two cases, and that as the publication of the notices under s. 6 of Act XI of 1859 is essential to the validity of the sale, so it rests on the person who appears to support the sale (the auction-purchaser in this case) to prove that the notices were duly prepared, served, and posted.

(1) (1898) I. L. R. 21 Calc. 70.

(2) (1886) I. L. R. 13 Calc. 197.

(3) (1891) I. L. R. 19 Calc. 699.

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He points out that in the document, exhibit A, the attested copy of the robakari of the Collector of Shahabad, dated 5th August 1896, which directs the issue of a notice in respect of arrears of revenue of the instalment of March 1896, and in the endorsement of the service of the notice appearing thereon there is no mention of the plaintiffs' estate, nor anything to connect the notice, service of which is endorsed thereon, with the notice under s. 6 of the Act in respect of the plaintiffs' estate, dated 5th August 1896, copy of which has been filed as exhibit J. This latter notice, we must observe, is correct in form. The evidence of the Nazir and the peon is, it is contended, not definite enough to connect the notice served with the plaintiffs' estate. No doubt there is this flaw on the face of the robakari, exhibit A, but we may observe that the evidence of the witness for the plaintiff, Thakur Lal, goes to some extent to cure it when he says:— "I saw the sale proclamation hung up on the south side of the Collector's Bench, where all sale proclamations are hung up. That proclamation was in respect of Nurpore Mujhowli."

We have carefully considered the argument which has been advanced, but we are unable to hold that there is authority to support it. We cannot find any analogy between the case first relied on and the present case. In that case the landlord was bound to show that a certain notice had been served before his suit for cesses could succeed, but we cannot hold that the purchaser of an estate at a sale for arrears of revenue is in the same position. In the case of a sale by a zamindar of a patni taluq under the Regulation, the zamindar is exclusively responsible for the observance of the forms prescribed for the publication of notice. The burden of proving due publication is entirely upon him, and in every suit brought to contest the legality of the sale he has to prove the due observance of all the formalities, even if the plaintiff gives no evidence in support of his plea of non-service. And the plea of non-service or of any informality in publication may be taken at any stage of the suit or even for the first time in appeal. The notices too are served by the landlord's servants and not by the Collector.

In the case of a sale for arrears of Government revenue, the notices are served in the ordinary way through the officers of

the Revenue Court, and the presumption under s. 114, clause (e) of the Evidence Act would arise in respect to the service of such notices until the contrary was proved. The onus of proving that there has been irregularity in the preparation, service or posting of the notice rests on the person who seeks to have the sale set aside, and s. 33 of Act XI of 1859 provides that no sale shall be annulled by a Civil Court upon any such ground, unless such ground shall have been declared and specified in an appeal made to the Commissioner under s. 25 of Act XI of 1859. There appears, then, to us to be no analogy between the present case and the case of the sale of a patni taluq.

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It must be noticed that the argument which the learned Advocate-General had advanced does not appear to have suggested itself to the plaintiffs in the Court of first instance, and the evidence adduced fails to prove any omission to serve or post the notices under s. 6 of the Act. So far as the evidence proves anything, it would appear to raise a presumption that the notices were served.

We are, moreover, unable to accept the contention that s. 8 of Act VII of 1868 does not apply to the serving and posting of the notices under s. 6 of Act XI of 1859. The cases relied on to support the opposite view do not in our opinion go further than to lay down that, if there be a defect in the notice itself and in consequence the sale be held under circumstances under which it could not have been held in accordance with the provisions of the law, then that defect is not cured by s. 8 of Act VII of 1868.

On this last ground too we feel bound, therefore, to hold that the plaintiffs' case must fail, because they have not proved that there was any irregularity or illegality in the issue or posting of the notices under s. 6 of Act XI of 1859, and because after the issue of the sale certificate to the purchaser, the provisions of s. 8 of Act VII of 1868 are a bar to their success on the ground which they set forward.

It is true that there are circumstances in this case which render it doubtful whether it is safe to presume that the proper formalities of the law are observed in the Collector's office in Arrah in all cases of sale of estates. The sale of the $5\frac{1}{2}$ annas' share of the plaintiffs' estate for road cess on the 20th April 1896 has

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been regarded by the Lower Court, for reasons given, as a sham, and the sale of the whole estate for arrears of the road cess and public works cess, which seems to have taken place on the 14th June 1897, that is to say, nearly a year after the sale which is in question in the present suit, was afterwards set aside as irregular under s. 311, Civil Procedure Code, by the Revenue Officer on the 7th September 1897. The sales in both these instances appear to have taken place without the knowledge of the registered proprietors, and there is little doubt that the sale in September 1896 was held without the knowledge of the present plaintiffs. None of the owners of other shares in the village, who would presumably have been anxious to purchase the plaintiffs' share, appeared to bid, and the bidding at the sale was confined to a few mukhtears, and there was evidently no contest between them.

We do not, however, find that the plaintiffs have made out in this case that their co-sharers colluded with the purchasers to bring about the sale. The non-payment of the arrears was no doubt the result of their carelessness, but they joined afterwards in the appeal to the Commissioner, and we are unable to believe the evidence of plaintiffs' witness, Nandan Singh, that at the time of the sale, Bajrangi Singh, defendant No. 4, one of those co-sharers, told him that he was purposely causing the property to be sold and purchased by Net Loll Sahu.

The case is in our opinion one of undoubted hardship. A valuable estate has been sold at a very inadequate price for an arrear of revenue which, in comparison with the total revenue on the estate, was very trifling. The law, however, does not give to the Civil Courts power to interfere with a sale on the ground of hardship, and the Commissioner of the Division, who alone had power under s. 26 of the Act to move to set aside the sale on such a ground, has not done so. His judgment in appeal has not been laid before us, and we do not know what reasons may have influenced him in his decision.

We feel bound to hold that the plaintiffs have failed to make out a sufficient case for annulling the sale, and we therefore confirm the judgment and decree of the Subordinate Judge and dismiss the appeal with costs.

M. N. R.

Appeal dismissed.

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Interest—Mortgage bond—Penalty—Increased rate of interest from date of default—Contract Act (IX of 1872) s. 74—Act VI of 1899, s. 4.

A stipulation in a bond for increased interest from the date of default may be a stipulation by way of penalty, and the Courts in this country are competent to grant equitable relief against such stipulation, independently of section 74 of the Contract Act.

THE defendant, Abdul Gani, appealed to the High Court.

The defendant executed on the 1st December 1888 a mortgage bond in favour of the plaintiff for Rs. 950, stipulating to pay interest at the rate of $1\frac{1}{2}$ per cent. per mensem and to repay the amount by the 11th March 1889. It was further provided in the bond that "if the amount be not paid within the stipulated time, the interest on the amount of loan from after the expiration of the fixed time should be charged at the rate of 5 per cent. per mensem up to the date of ultimate recovery."

The plaintiff brought the present suit on the mortgage bond, alleging that the defendant had on different dates paid Rs. 865 only, on account of principal and interest, and claiming as balance due Rs. 610-10-6 as principal and Rs. 2,553-10-0 as interest, amounting to Rs. 3,164-4-6 in all.

The defendant denied liability under the bond, alleging non-receipt of consideration and contending that the bond was a *benami* transaction. With regard to the stipulation for increased interest, it was contended that the said clause was inserted in the bond as a penalty clause, at the instance of the gentleman in whose favour the deed was really executed, and that it was not contemplated that the condition would ever be enforced.

* Appeal from Appellate Decree No. 294 of 1899, against the decree of E. G. Drake-Brockman, Esq., District Judge of Gaya, dated the 3rd of September 1898, modifying the decree of Babu Baroda Prassana Shome, Subordinate Judge of that district, dated the 11th of May 1896.

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The Subordinate Judge overruled all the objections of the defendant, except as regards the increased rate of interest. In regard to this question, he held on the evidence relating to the conduct of the parties in respect of payments actually made after the due date that the real intention of the parties was that so long as the defendant voluntarily made payments in partial satisfaction of the loan, interest would be charged at the lower rate, but that, if the defendant failed to make any payment at all, or discontinued repayment of the loan, interest would be charged at the higher rate. He therefore awarded interest at the lower rate up to the date of the last payment made by the defendant, and at the higher rate on the balance of the principal for the later period. The total amount decreed was Rs. 1,399-6-3.

Both the parties appealed to the District Judge. The appeal preferred by the defendant was dismissed. On the appeal preferred by the plaintiff, which related only to the interest allowed by the Lower Court, the District Judge held that the inference as to the intention of the parties drawn by the Lower Court could not be upheld so as to override the clear terms of the bond. He accordingly decreed the suit in full. Against this decision the defendant appealed to the High Court. The plaintiff also filed a cross appeal, claiming interest at the higher rate up to the date of realization.

Babu Saligram Singh and Mouloi Mustafa Khan for the appellant.

Babu Mahabir Sahay for the respondent.

Cur. adv. vult.

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PRATT AND MITRA JJ. This is an appeal in an action for recovery of mortgage-money due on a simple mortgage for Rs. 950 dated the 1st December 1888. The money was repayable on or before the 11th March 1889 with interest at $1\frac{1}{4}$ per cent. per mensem. It was, however, stipulated that "if the amount be not repaid within the time fixed, the interest on the amount of loan from after the expiration of the fixed time should be charged at the rate of 5 per cent. per mensem up to the date of ultimate recovery." The defendant paid from time to time

Rs. 1,567, and the suit was for Rs. 610-10-6 as principal and Rs. 2,553-10-0 as interest. The Subordinate Judge gave the plaintiff a decree for Rs. 1,399-6-3, overruling all the contentions of the defendant except as to interest after the due date. Both parties appealed, with the result that the plaintiff's claim was decreed in full by the District Judge.

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The only point that requires our consideration refers to the rate of interest after the 11th March 1889. The contention of the defendant, as set forth in his written statement and pressed before us, is that the stipulation as to interest at 5 per cent. after the expiry of the due date was a penal provision, not intended to be enforced, and the plaintiff was entitled to have interest at only a reasonable rate.

It has been held in *Mackintosh v. Crow*(1), *Sajaji Panhaji v. Maruti*(2), *Nanjappa v. Nanjappa*(3), *Kala Chand Kyal v. Shib Chunder Roy*(4) and *Rameswar Prosad Singh v. Rai Sham Kishen*(5) that a provision in a bond, for payment of interest at an increased rate from the date of the bond, on failure of the debtor to pay the principal with interest on the due date, always amounts to a provision for a penalty, and section 74 of the Contract Act applies to the claim for interest at an increased rate from the date of the bond until realization. If, however, the increased rate of interest is stipulated to have operation only after the date of default, the provision has not generally been regarded as a penalty. We may refer to *Deno Nath Santh v. Nibaran Chandra Chuckerbutty*(6), *Ramendra Roy Chowdhury v. Serajuddin Ahamed*(7) and *Manoo Bepari v. Durga Churn Saha*(8) as illustrating the distinction between the two classes of cases.

In *Umar Khan v. Sale Khan*(9), which came before a Full Bench of the High Court at Bombay, all the previous cases were reviewed, and the Court came to the conclusion that "a proviso for retrospective enhancement of interest is generally a penalty which should be relieved against, but that a proviso for enhanced

(1) (1882) I. L. R. 9 Calc. 639.

(2) (1889) I. L. R. 14 Bom. 274.

(3) (1888) I. L. R. 12 Mad. 161.

(4) (1891) I. L. R. 19 Calc. 392.

(5) (1901) I. L. R. 29 Calc. 43.

(6) (1899) I. L. R. 27 Calc. 421.

(7) (1898) 2 C. W. N. 234.

(8) (1898) 2 C. W. N. 333.

(9) (1892) I. L. R. 17 Bom. 106.

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interest in the future cannot be considered as a penalty, unless the enhanced rate be such as to lead to the conclusion that it could not have been intended to be a part of the primary contract between the parties."

The covenant as to interest in the bond in *Pardhan Bhukhan Lal v. Narsing Dyal*(1) was very similar to that in the present suit, and Rampini J. in that case observed: "The stipulation for increased rate of interest contained in the bond now sued on *may* be a penalty, but is not necessarily so merely because the increased rate is an exorbitant one. Whether it is a penalty or not is rather a question of fact than one of law." The case was remanded for the determination of the question, whether, in the circumstances of the case, the stipulation to pay increased rate of interest was not really a penalty against which a Court of Equity ought to grant relief.

In *Deno Nath Santh v. Nibaran Chandra Chuckerbutty* (2) the contract was to pay Rs. 20 annually as interest, and, in default, to pay interest on the consolidated amount of the principal and Rs. 20 as interest, at the rate of Rs. 3-2 per cent. per mensem. It was urged for the debtor that, having regard to the nature of the contract, the Court should hold on equitable principles that it was not enforceable, and that the plaintiff mortgagee was entitled only to reasonable compensation, and *Pardhan Bhukhan Lal v. Narsing Dyal*(1) was relied on. Banerjee J., in dealing with the question, said: "Although it is in the power of the Court, if a proper case is made out, to refuse to enforce a clause in a contract quite independently of s. 74 of the Contract Act, no such case has been made out." Such a view is opposed to the opinion of the Full Bench of the Bombay High Court in *Umar Khan v. Sale Khan*(3) and of Rampini J. in *Pardhan Bhukhan Lal v. Narsing Dyal*(1). The Indian Legislature has accepted in Act VI of 1899 the view of the Bombay High Court and that of Rampini J. The Explanation to s. 74 of the Contract Act, as amended by Act VI of 1899, is "A stipulation for increased interest from the date of default may be a stipulation by way of penalty," and illustration

(1) (1898) I. L. R. 26 Calc. 300, 310. (2) (1899) I. L. R. 27 Calc. 421.

(3) (1892) I. L. R. 17 Bom. 106.

(d) runs thus:—"A gives B a bond for the repayment of Rs. 1,000 with interest at 12 per cent. at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent. from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable." The increase from 12 to 75 per cent. is in itself sufficient, according to the illustration, for a finding that the stipulation is penal within s. 74 of the Act.

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The present case is not governed by Act VI of 1899, but we are inclined to agree with the views expressed by the Judges of the High Court at Bombay and by Rampini J. It is not very material, however, whether relief be granted to the debtor on equitable considerations or by the application of s. 74 of the Contract Act. In *Pardhan Bhukhan Lal v. Narsing Dyal*(1), the learned Judges agreed in remanding the case, Ghose J. directing the Court below to consider the stipulation as to interest from an equitable point of view and Rampini J. to consider the facts and circumstances of the case, with a view to determine whether the stipulation was penal within the Statute.

In the present case, not only is the increased rate of interest very high, but there is some evidence to show that the stipulation was inserted to ensure prompt payment by the debtor. The Courts below have not considered the case from the point of view that provisions as to increased interest might be penal or that relief might be granted on equitable grounds. If it be not strictly enforceable, reasonable compensation should be granted to the plaintiff.

We accordingly remit the case for retrial on the question of interest after due date. As the appellant has been partly unsuccessful, we make no order as to costs.

There is a cross appeal on behalf of the respondent as to interest from the date of the decree. We need only draw the attention of the Courts below to *Rameswar Prosad Singh v. Rai Sham Kishan* (2). Interest should be awarded according to the rule therein laid down.

M. N. R.

Case remanded.

(1) (1898) I. L. R. 26 Calc. 300.

(2) (1901) I. L. R. 29 Calc. 43.

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Deeds, interpretation of—Grant, construction of—Grant by way of lease—“Istemrari mokurari”—Grant for life—Tenure, permanent and hereditary—Grant for maintenance—Impartible Raj—Declaratory suit—Bengal Tenancy Act (VIII of 1885), ss. 106, 107, 109—Limitation Act (XV of 1877), Sch. II, Art. 14—Civil Procedure Code (Act XIV of 1882), s. 375—Registration Act (III of 1877) ss. 17, 49.

A grant was made of certain villages by the proprietor of an impartible Raj to his wife, in *istembrari mokurari*, at a fixed annual rent, the deed containing the following covenant: “I, the declarant, or any representatives, have and shall have no claim, right or dispute thereto, except the aforesaid reserved rent.”

Held, (1) that the use of the words ‘*istembrari mokurari*’ in the lease was not sufficient to create a permanent and hereditary tenure; and

(2) that the words excluding the claim of, or right of interference by, the grantor or his representative did not necessarily import the creation of a permanent and hereditary tenure, but might fairly be construed as only to mean that the grantor or his representatives would not have the power to disturb the grantee during her lifetime.

THE defendant, Agin Bindh Upadhyia, appealed to the High Court.

The plaintiff, Raja Mohan Bikram Shah, as owner and possessor of the Ramnagar Raj estate, brought the present suit for the adjudication of his title to mouzah Parsi and for a declaration that the defendant had acquired no perpetual *mokurari* right in the said mouzah and that the latter’s purchase of a leasehold interest therein would become inoperative and void after the death of his predecessor in title, Rani Nowruchi Kumari Debi.

It appears that on the 22nd March 1876, Raja Perlhad Sen, the then proprietor of the Ramnagar estate, made a grant in *istembrari mokurari* of nine mouzahs, including mouzah Parsi, to

* Appeal from original Decree No. 464 of 1900, against the decree of Babu H. C. Mitra, Additional Subordinate Judge of Chapra, dated the 17th of September 1900.

his second wife, Rani Nowruchi Kumari Debi, the terms of which grant are set out in the judgment of the High Court. Plaintiff is the son of a daughter of Raja Perlhad Sen by his first wife, who had predeceased the latter. After the death of Raja Perlhad Sen, there was litigation about the estate, and finally on the 8th April 1889, a suit brought by the plaintiff against Rani Nowruchi Debi was compromised, and a decree passed in accordance with the terms of ekrarnamahs mutually executed and an award submitted by arbitrators. Under this decree the plaintiff got possession of all the disputed properties, with the exception of a number of mouzahs which were allotted to Rani Nowruchi Debi in lieu of maintenance, and which were to remain in her possession during her lifetime without any power of transfer or mortgage. These mouzahs included the nine villages granted to Rani Nowruchi Debi by Raja Perlhad Sen by the deed above mentioned. In 1890, in execution of a decree obtained by one Tej Lachmi Debi against Rani Nowruchi Debi, mouzah Parsi was sold and purchased by one Chandi Pershad Singh, who again sold it to the defendant on the 22nd September 1892. In April 1896, in the course of cadastral survey proceedings held under the Bengal Tenancy Act, the defendant got his name recorded as *mokuraidar* in possession of mouzah Parsi. The cause of action for the present suit was accordingly stated to have accrued on the 24th April 1896, the date of the aforesaid entry. The suit was instituted on the 19th January 1900.

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The Subordinate Judge decreed the suit, and the defendant appealed from that decree.

Babu Karuna Sindhu Mookerjee, Babu Akhoy Kumar Banerjee and Moulavi Mahomad Habibullah for the appellant.

Babu Nilmadhav Bose, Babu Shib Chandra Palit, Babu Jogendra Chandra Ghose and Babu Dwarka Nath Mitter for the respondent.

Cur. adv. vult.

PRATT AND MITRA JJ. Raja Perlhad Sen Bahadur was the proprietor of the impartible estate known as the Ramnagar Raj in district Champaran. By his first wife, who predeceased him, he had a daughter, and the plaintiff (Raja Mohan Bikram

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Shah) is her only son. Raja Perlhad Sen had two other wives, Rani Bindubashini Debi and Rani Nowruchi Kumari Debi, but he had no issue by them. On the 22nd March 1876 he granted to Rani Nowruchi nine villages in *istmrari mokurari*, reserving an annual rent of Rs. 250. The property in dispute in this case is mouzah Parsi, one of the nine villages. One of the main questions discussed before us refers to the nature of this *istmrari mokurari* grant.

Raja Perlhad Sen died on the 18th September 1879, leaving him surviving the plaintiff (his grandson) and Rani Bindubashini and Nowruchi. By virtue of his will dated the 31st August 1876, the grant of the probate of which was contested by Rani Nowruchi, the plaintiff is now the proprietor of the Ramnagar Raj. The question of the genuineness of the will was disposed of in favour of the plaintiff by the High Court on the 28th February 1887 on the appeal of Rani Nowruchi Debi. An unsuccessful attempt was thereafter made by Rani Nowruchi to appeal to the Privy Council, but her application for leave to appeal was dismissed on the 10th August 1888.

During the pendency of the litigation for the probate of the will of Raja Perlhad Sen, his widows (Rani Bindubashini and Nowruchi) obtained possession of his estate, and on the death of Rani Bindubashini in 1886, Rani Nowruchi as the surviving widow obtained possession of the entire estate. After the decision of the High Court in the case for probate of the will of Raja Perlhad Sen, the plaintiff sued Rani Nowruchi (suit No. 8 of 1888) in the Court of the first Subordinate Judge of Saran for recovery of possession of the estates for mesne profits and for adjudication of his right to recover rent of the nine villages granted to her by the deed dated the 22nd March 1876.

On the 6th November 1888, Jamoonia and Parsonni, two out of the nine villages, were sold in execution of the decree for costs obtained by the plaintiff against Rani Nowruchi in the High Court. The plaintiff purchased Jamoonia, but Parsonni was purchased by a third person. Rani Nowruchi had also other debts to pay, and then there was her liability to the plaintiff for mesne profits. But she was entitled to have suitable maintenance from her husband's estate.

In this state of things the plaintiff and Rani Nowruchi came; and very properly, to terms, and two ekrarnamahs were executed—one by the plaintiff on the 28th November 1888 and the other by Rani Nowruchi on the 25th December 1888, in which the terms of the arrangements between the parties were set out. But there were some matters as to which the parties could not agree, and reference was made to certain arbitrators as to these. The arbitrators decided these disputed matters on the 21st and 22nd February 1889, and submitted an award which was accepted by the parties and a petition of compromise was filed in Court. On the 8th April 1889, the First Subordinate Judge of Saran passed his decree in the suit (8 of 1888), in terms of the ekrarnamahs and the award of the arbitrators which were embodied in the petition of compromise duly signed by both parties. The effect of these documents on the rights of the parties to the village Parsi is one of the important matters for decision in this appeal.

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Chanturani Tej Lachmi Debi, widow of one Giriraj Sen who had claimed at one time to be the heir of Raja Perlhad Sen, had a decree for money against Ranis Bindubashini and Nowruchi. In execution of this decree she put up for sale two of the nine villages, *vis.*, Gidha and Parsi, with the description that they were in the possession of the judgment-debtor, Rani Nowruchi, for her maintenance for life. Both the villages were sold and were purchased by Babu Chandi Pershad Singh—Gidha for Rs. 675 and Parsi for Rs. 825. The sale was confirmed without opposition on the 17th September 1890. On the 22nd September 1892 the defendant, Agin Bindh Upadhya, purchased the villages from Babu Chandi Pershad Singh. The price stated in the conveyance was Rs. 7,000.

Shortly after the purchase, there were proceedings for cadastral survey under Chapter X of the Bengal Tenancy Act, and it appears from a paper called the Dispute list of Mouzahs, wherein one Mahomed Ibrahim is described as the first party and Agin Bindh as the second party, that there was a dispute as to village Parsi, and the Revenue Officer directed that Parsi should be recorded as mokurari in possession of Agin Bindh. In the record of rights finally framed and published under s. 105, sub-section (2) of the Bengal Tenancy Act on the 24th April 1896, Parsi was

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recorded as the perpetual mokurari of Agin Bindh Upadhyas. As regards the other mouzah, Gidha, the plaintiff filed in time an objection and it was successful. The defendant Agin Bindh appealed against the order of the Revenue Officer as to Gidha, but we are not informed of the result of the appeal. It was, we are told, pending before the Special Judge at the time of the trial of the suit which has given rise to this appeal.

On the 19th January 1900, the plaintiff instituted the suit now in appeal for a declaration that the defendant had no perpetual mokurari right in Parsi, and that the defendant's purchase had no effect except during the lifetime of Rani Nowruchi Debi. The cause of action was alleged to have accrued on the 24th April 1896, the date of the publication of the record of rights containing the defendant's name as perpetual mokuridar of village Parsi.

The defendant pleaded that the grant of Rani Nowruchi was of a permanent character and set up an instrument called a *sadarathpatra* bearing date the 25th Basakh 1300 F.S. (26th April 1893), alleged to have been executed by the plaintiff, by which he, on receipt of a premium (*nazarana*) of Rs. 500, had admitted the defendant to be the holder of a mokurari tenure, lasting from generation to generation, both in male and female lines. The plaintiff denied the genuineness of this document as well as of the two *farkhat*s or rent receipts filed by the defendant to prove the plaintiff's recognition of the defendant's purchase.

If the *sadarathpatra* is admissible in evidence and is a genuine instrument, the plaintiff's suit must fail, and it will not be necessary to go into the other questions already adverted to and discussed at the Bar.

The Subordinate Judge, on the plaintiff's objection as to the admissibility of the *sadarathpatra* in evidence, held that, though it was not stamped and registered according to the Acts in force, it could be admitted as a document of recognition of the defendant's purchase of the interest of Rani Nowruchi; but at the same time he came to the conclusion that it was palpably a forged and fabricated document. He also held that the *farkhat*s were not genuine.

We shall first of all deal with the *sadarathpatra*. The material portion of this document runs thus: "The *Hasur*

(plaintiff) also admits you (defendant) as representative of the mokuraridar (Rani Nowruchi) and appoints you as a mokuraridar, and gives this in writing that you and your children, generation after generation, both in male and female lines, should continue in possession and occupation of the said villages." The document not only recognises the defendant as a purchaser of the mokurari right of Rani Nowruchi, but also creates a perpetual mokurari right in his favour. It declares as well as creates a right to immoveable property, and is both a confirmatory lease as well as a lease for a term exceeding one year. The document clearly comes within s. 17 of Act III of 1877, and being unregistered is inadmissible under s. 49 of the Act.

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We are also of opinion that the *sadarathpatra*, as well as the *farkhat*s filed in support of the defendant's story of recognition by the plaintiff are not genuine. The very fact of the *sadarathpatra* being unstamped and unregistered creates grave doubts as to its genuineness. In the year 1893, as in the few previous years, the defendant was openly siding with the plaintiff's enemies and helping them. He was the principal servant of Rani Nowruchi, who was hostile to the plaintiff at least until November 1888. The compromise recorded by the decree in suit No. 8 of 1888 was not followed by friendly feelings. Rani Nowruchi and the defendant both sided with Chantaria Padomraj, son of Giriraj, a claimant to the Raj estate, and she was actually residing in the same house with Padomraj and his mother, Tej Lachmi Debi. The claim of Giriraj to the Ramnagar Raj was followed, shortly after his death, by a suit by his son Padomraj against the present plaintiff in the Court of the First Subordinate Judge of Saran, and it was numbered 48 of 1891. It has been abundantly proved, notwithstanding the defendant's denial, that in this litigation he and the Rani were openly helping Padomraj. On the 26th April 1893, the date which the *sadarathpatra* bears, the trial was being actually proceeded with at Chapra, and it is not probable that the plaintiff would at this time execute for Rs. 500 only a deed in favour of his avowed enemy, confirming or creating a perpetual tenure, when according to the defendant himself his profit from the two mouzahas was a little less than Rs. 1,000. He let them out in ticca to Mr. Murray for Rs. 1,000 on a bonus of Rs. 500.

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Less than five years before, the grantor's legal representative and the grantee declared, as will presently appear, in their respective *ekramnamahs*, that the grant was for maintenance and for life only, and a family arrangement on this basis was arrived at and incorporated in a decree of Court, and now without any ostensible reason, a person who is comparatively a stranger and who could not possibly at the time have any influence over the plaintiff made him execute an instrument superseding the covenants incorporated in the decree.

Ramkritarth Lal is said to have engrossed the *sadarathpatra*, but he was dead before it was produced in the Court of the Revenue Officer. His son, Mathura Pershad, however, denies that the handwriting was his father's, and he says that his father was at the date of the deed ill and was not at Ramnagar, where the executant was then admittedly residing. The defendant himself has made inconsistent statements as to the preliminaries leading to the fixing of the bonus and the settling of the terms of the covenant as to permanency. The draft was made at the meeting for the execution of the deed, then and there, in a short time. The witness Ramsaran Lal had gone there for a receipt and saw the execution of the deed, but he did not know then of the case of Padomraj against the plaintiff, a palpable falsehood. He saw that the payment of Rs. 500 was entered by Ramkritarth Lal in the account book, but the book has been produced and it does not contain the entry. Baldeo Singh had gone to the place for paying his respects to the plaintiff. Govind Upadhya, a man deep in debt and a chance witness, saw the execution of a *farakhati*. We cannot but discard the testimony of such witnesses. The rebutting evidence on behalf of the plaintiff is no doubt not very strong, but that evidence is supported by the probabilities of the case and the books of account. The absence of the plaintiff from the witness box has been commented upon, but we know what the habits and practices of persons of the plaintiff's position are in this country. They are always reluctant to give their depositions even in true cases, and we are not always prepared to draw adverse inferences against them for their non-attendance, when the opposite party on whom lies the burden fails to make out a *prima facie* case by evidence of a reliable character. We find no reason to differ

from the Court below in its estimate of the evidence as to the *sakarathpatra* and the *farukhatia*.

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Leaving aside these documents as unproved, the questions for our consideration are—(1) That the suit was barred by the rule laid down in Art. 14 of the Second Schedule of the Limitation Act; (2) that the order of the Revenue Officer directing that the defendant should be recorded as a permanent *mokuraidar* had the effect of a decree under ss. 106 and 107 of the Bengal Tenancy Act and the matter could not be reagitated; (3) that the grant made by Raja Perlhad Sen to Rani Nowruchi was permanent; (4) that the petition of compromise and the decree in suit No. 8 of 1888 had not the effect of superseding the original grant and converting the permanent grant into one for life; and (5) that, at all events, the suit was not a fit one for a declaratory decree.

The object of the suit was not to have set aside any order of the Revenue Officer acting under Chapter X of the Bengal Tenancy Act. The plaintiff asked for a declaration, and it was not necessary for him to have any order set aside to enable him to get relief. The suit was one coming strictly within the provisions of s. 109 of the Bengal Tenancy Act—to have a declaration that an undisputed entry in the *khawati* and the *khatian* was erroneous. We do not see how Art. 14 of the Second Schedule of the Limitation Act can have any application to the present case.

The certified copy of the order of the Revenue Officer set out at pages 118 and 119 of the paper-book bears no date, and it does not appear that it was passed in a proceeding under s. 106 of the Bengal Tenancy Act. The plaintiff was no party to the proceeding, and the real matter in dispute between him and the defendant was left open by the Revenue Officer to be decided in a Civil Court. The defendant has not even attempted to show how the first party (Mohomed Ibrahim) in the proceeding before the Revenue Officer was connected with the plaintiff. It is remarkable that the plaintiff could and did come in time to object to the record as to Gidha, the other village held by the defendant, and he was successful. It is also worthy of note that the Revenue Officer directed that village Parsi should be entered as “*mokurari*

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in the possession of Agin Bindh." In one part of the order the words "*istemrari mokurari*" occurring in the *sadarathpatra* are incidentally referred to, but the ordering portion is confined to the word *mokurari* only. In the *khatian*, however, we find the words "perpetual *mokurari*." The order of the Revenue Officer was in itself innocuous, but the record in the *khatian* affected the plaintiff's future right to possession after the death of Rani Nowruchi. We therefore overrule the second contention of the appellant.

We are also of opinion that this is a fit case for the grant of relief by a declaratory decree. A cloud has been thrown over the plaintiff's title to resume the grant after the death of Rani Nowruchi. The defendant had produced documents before the Revenue Officer which might affect the plaintiff's future right, and the entry in the record of rights might prejudice the plaintiff, if it was not timely corrected.

The grant to Rani Nowruchi by her husband was made on the 22nd March 1876, as we have seen, of nine villages in *istemrari mokurari* at a fixed rental of Rs. 250 per annum. It is in the following words :—

"I am Raja Perlihad Sen Bahadur, proprietor of tappas Ramnagar, Jamauli, half of tappa Chingwon, taluka Jamira, pergannah Majhowa, appertaining to Ramnagar Raj, district Champaran, within Sube Behar.

"Whereas I, the declarant, have out of my free will and accord granted the nine mouzahs specified below, situated in tappas Ramnagar, Jamauli and Chingwon and taluka Jamira, pergannah Majhowa, appertaining to Ramnagar Raj as per four boundaries specified below, held and possessed by me up to this moment without co-partnership of anybody and possession of any other person and am appropriating the proceeds thereof, in *istemrari mokurari* to Nowruchi Kumari Debi, my second wife, at an annual rent of Rs. 250 of the imperial coin by all means complete and put her into the possession and occupation of the mouzahs specified below, the *mokurari* properties, for this reason I, the declarant, being in sound state of body and mind, do make this trustworthy declaration and give in writing that the said Maharani should continue in possession and occupation of the said mouzahs as *istemrari mukuridar* and appropriate the produce thereof and pay to me, the declarant, Rs. 250, the aforesaid reserved *mokurari* rent as per specification given below, year after year, without any objection. I, the declarant, or any representatives have and shall have no claim, right or dispute thereto, except the aforesaid reserved rent. For this reason these few words are executed in the form of an *istemrari mokurari* deed that they may be so use when required."

There are no words of inheritance in this document such as—*naslan bad naslan, watan bad watan, sand furzand* or *putra poutradi krame*, ordinarily occurring in instruments creating hereditary interest. The contention of the learned vakil for the defendant appellant is that the words *istemrari mokurari* are in themselves sufficient to create a permanent tenure at fixed rent, and that the additional words *naslan bad naslan*, etc., though frequently used, are unnecessary. His further contention is that the words used in the last part of the deed—"I, the declarant, or any representatives, have or shall have no claim or right or dispute thereto (grantee's possession and occupation and appropriation of the produce) except the aforesaid reserved rent"—indicate that the grantor intended to create a perpetual tenure, and that these words read with the words *istemrari mokurari* make the interest of the grantee transferable and heritable.

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The words *istemrari* and *mokurari* are both of Arabic origin, and literally they mean continuous (running) and fixed. But what is their meaning when used together as a compound and applied to intermediate tenures? They might mean continuous or permanent during the lifetime of the grantee or permanent as regards hereditary descent. *Lilanand Singh v. Munorunjun Singh* (1) and *Tulshi Pershad Singh v. Ram Narain Singh* (2). Their lexicographical meaning is, therefore, of little use to us, as observed by the Privy Council in *Tulshi Pershad Singh v. Ram Narain Singh* (2). We have to see to the customary meaning of the words as established by judicial decisions.

Permanent intermediate tenures at fixed rent were unknown or were seldom recognised in India under the Mahomedans, and the British Government were at first reluctant to recognise them. The Bengal Code of 1793 passed by the Government of Lord Cornwallis was decidedly against their creation (Regulation XLIV, s. 2). The prohibition was repeated in Regulation L of 1795, s. 2, and Regulation XLVII of 1803, s. 2. The proprietors of revenue-paying estates were first permitted to create them by Regulation V of 1812, s. 2, and Regulation XVIII

(1) (1878) 18 B. L. R. 124, 133.

(2) (1885) I. L. R. 12 Calc. 117, 130.

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of 1812, s. 2. And as regards tenures technically known as *patni*, *darpatni* and *sepatni*, they were first recognised by Regulation VIII of 1819. There is no reference in these Regulations to *istemrari mokurari* tenures. Ss. 16 to 19 of Regulation VIII of 1793 refer to *mokurari* and *istemrari proprietary* rights held directly under the Government. The words are nowhere defined. They seem to have been used as interchangeable expressions, and might apply to a grant for life as well as heritable grants.

The decisions of the Sadar Dewani Adawlat at Calcutta and of the High Court and the Privy Council as to the meaning of the expression *istemrari mokurari* were reviewed in *Tulshi Pershad Singh v. Ram Narain Singh*(1). The decisions of the High Court at Calcutta in *Lakhu Kowar v. Roy Hari Krishna Sing* (2) and *Raja Ram Narain Singh v. Amir Khan* dated the 4th September 1877 (unreported) were overruled, and their Lordships thus summed up their judgment:—"After this review of the decisions their Lordships think it is established that the words '*istemrari mokurari*' in a patta do not *per se* convey an estate of inheritance, but they do not accept the decisions as establishing that such an estate cannot be created without the addition of the other words that are mentioned, as the Judges do not seem to have in their minds that the other terms of the instrument, the circumstances under which it was made or the subsequent conduct of the parties, might show the intention with sufficient certainty to enable the Courts to pronounce that the grant was perpetual." They added:—"As has been said, their Lordships, having regard to the customary meaning of the words, as established by the decisions which have been noticed, are of opinion that they do not convey an estate of inheritance in this case." In *Beni Pershad Koeri v. Dudh Nath Roy*(3), their Lordships repeated what they had said in *Tulshi Pershad Singh v. Ram Narain Singh*(1) in the sentence—"An *istemrari mokurari* tenure is not necessarily a perpetual hereditary tenure."

(1) (1885) I. L. R. 12 Calc. 117, 130.

(2) (1869) 3 B. L. R. A. C. 226; 12 W.R. 3.

(3) (1899) I. L. R. 27 Calc. 156, 165; I. R. 26 I.A., 216.

It has been contended before us that the remarks of the Privy Council as to the effect of the use of the words *istamarari mokurari* without words of inheritance, such as *nashan bad nashan*, etc., must be read as referring to grants for maintenance, which are *prima facie* for life only. But we see no reason for such a limitation. The object of the grants in the last two cases might be the maintenance of the grantees, but the grants themselves did not expressly refer to the maintenance of the grantees as the purposes of the grants. In *Lalanand Singh v. Munorunjun Singh*(1), the tenure created was ghatwali, but when speaking of the words "*istamarari mokurari*," their Lordships doubted whether they meant "permanent during the life of the persons to whom they were granted or permanent as regards hereditary descent." Their Lordships were not prepared to accept the meaning put upon these words by the High Court in the same case. The observations of their Lordships in the later case referred to by us were general and not limited to maintenance grants only.

We think the use of the words *istamarari mokurari* in the grant in question is not sufficient to enable us to say that the tenure created was permanent and hereditary.

Then as to the contention that the words "I, the declarant, or any representatives, have or shall have no claim, right or dispute thereto except the aforesaid reserved rent," used in the latter part of the deed, indicate with sufficient certainty that the grant was permanent and at fixed rent. Reliance has been placed on *Ram Narain Sing v. Pearay Bhugut*(2), *Kanhia v. Mahin Lal*(3), *Thakur Singh v. Nokhe Singh*(4), *Raj Narain Bhadury v. Ashutosh Chuckerbutty*(5) and the same case in appeal, *Raj Narain Bhaduri v. Katyayani Dabee*(6). In *Ram Narain Sing v. Pearay Bhugut*(2) and *Thakur Singh v. Nokhe Singh*(4), it was no doubt held that the use of the words by which the claim of the donor and his heirs was excluded sufficiently indicated the intention to create a hereditary grant, even without the ordinary words used to express a grant to the donee and his heirs (*putra poutradi, nashan*

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(1) (1873) 13 B. L. R. 124, 133.

(2) (1888) I. L. R. 9 Calc. 830.

(3) (1888) I. L. R. 10 All. 495.

(4) (1901) I. L. R. 23 All. 309.

(5) (1899) I. L. R. 27 Calc. 44.

(6) (1900) I. L. R. 27 Calc. 649.

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bad naslan, etc.). The words used in the instrument construed in those cases were, as they appear from the reports, very similar to those used in the instruments before us. But the deed construed in the first-named case is a will and in the other case a deed of gift and not leases creating intermediate tenures. They, therefore, stand on essentially different footings. The duration of a lease depends upon the period fixed either expressly or by implication, and when no time is fixed the lease is ordinarily deemed to be one from year to year. But transfers of other descriptions ordinarily pass the entire interest of the transferors.

In *Kanhia v. Mahin Lal*(1), the words relied on by the learned Judges as indicating a hereditary grant are—"I, my issues, relations, shall have no claim in respect of the house against the donee or *her heirs*, and if any of my heirs does so, the claim shall be false." The words "or her heirs" obviously denoted that the grant was hereditary. The words excluding the claims of the donor and his heirs were redundant. The judgments in *Raj Narain Bhadury v. Ashutosh Chuckerbutty*(2) and *Raj Narain Bhaduri v. Katyayani Dabee*(3) were based upon the particular word *malikatwa* used in the document followed by other words which clearly showed the intention to create an absolute heritable and alienable interest. These cases are, therefore, no authorities bearing on the construction of the grant in the present case.

We think the solution of the question as to the effect of the words excluding the claim or right of interference by the grantor and his representatives is contained in the decision in *Tulshi Pershad Singh v. Ram Narain Singh*(4). We find in the istemrari mokurari deed propounded in that case the following sentence:—"I, the malik, and my heirs shall not dispossess the said mokur-aridar from the mokurari estate." And notwithstanding the use of these words, the High Court at Calcutta as well as the Privy Council held that the grant was one for life only. The words in the instrument under construction are of similar import, and they may fairly be construed as meaning that the grantor and his representatives would not have the power to disturb the grantee during her lifetime.

(1) (1888) I. L. R. 10 All. 495.

(2) (1899) I. L. R. 27 Calc. 44.

(3) (1900) I. L. R. 27 Calc. 649.

(4) (1885) I. L. R. 12 Calc. 117.

The tenure in question was one carved out of an impartible estate for the benefit of a wife of its holder, and she had no issue, who could be benefited by a hereditary grant. It was very necessary that possession during her lifetime should be secured to her, and the next holder of the estate should have no power of interfering with it. In the Pacheet estate, which is an impartible Raj, grants for maintenance are resumable on the death of the grantor by the next taker of the Raj, *Anund Lal Sing Deo v. Gurrood Narayun Deo*(1): similar rights have been attempted to be enforced in other impartible estates, *Woodoyaditto v. Mukoond Narain Aditto*(2) and *Uddoy Adittya v. Jadub Lal*(3). It is very probable that Raja Perlhad Sen intended to avoid such disturbances in the possession of his wife during the period of her natural life and to secure to her the use of Rs. 3,000 per annum, which is said to have been the profit of the villages covered by the grant. Words importing hereditary descent are of constant use, and if the Raja intended to create a heritable tenure, nothing would have been easier than to add the oft-used words clearly expressing such an intention. The absence of such words is significant, and we cannot from the words actually used in the document accede to the defendant's contention that a permanent tenure was created by it.

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The circumstances and conduct of the parties attending and following the execution of the document are all opposed to the idea of permanency. A grant to a wife has generally been construed as one for life only, if apt words of inheritance are not added. We may refer to *Koonj Behari Dhur v. Prem Chand Dutt*(4), *Mahomed Shamsool Hooder v. Shewukram*(5), *Bhoba Tarini Debya v. Peary Lall Sanyal*(6) and *Lallu v. Jagmohan*(7) as instances.

No express power has also been given to Rani Nowruchi of alienation of her leasehold right.

(1) (1850) 5 Moore's I. A. 82.

(2) (1874) 22 W. R. 325.

(3) (1879) I. L. R. 5 Calc. 113.

(4) (1880) I. L. R. 5 Calc. 684.

(5) (1874) 14 B. L. R. 226; L. R. 2 I. A. 7.

(6) (1897) I. L. R. 24 Calc. 646.

(7) (1896) I. L. R. 22 Bom. 409.

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The most cogent argument, however, against the defendant's contention is that the villages granted to Rani Nowruchi, as well as those granted by another instrument to her co-wife, Rani Bindu-bashini, were always described as *deorhi mouzahs* which, we are informed, mean villages granted to female members of the *zenana* for the use of the profit. Ordinarily they are for maintenance. We find that in the proceedings in suit No. 8 of 1888, they are called *deorhi mouzahs*, and when Chaturani Tej Lachmi Debi advertised the Rani's interest in *Gidha* and *Parsi* for sale, she described them in the inventory as "Judgment-debtors' property given to her in lieu of maintenance by the Raja of Ramnagar." What she caused to be sold and what came to the defendant by the purchase by his vendor, Chandi Pershad, at the auction sale was "the receipt of maintenance and possession of the judgment-debtor during her lifetime in the villages *Gidha* and *Parsi*." The price paid by Chandi Pershad was only Rs. 1,500, which also indicates the nature of the right sold. The defendant is said to have paid to his vendor Rs. 7,000 for his purchase. As to this the evidence is of a shady character, and Rs. 7,000 is in itself an inadequate value for a fixed heritable interest in the sum of Rs. 1,000 per annum.

But whatever doubts there might be as to the nature of the grant as originally made by Raja Perlhad Sen, the defendant, we are of opinion, is precluded from setting up a title to a perpetual *mokurari* on account of the *ekrarnamahs*, the award of the arbitrators, and the petition of compromise and the decree in suit No. 8 of 1888 founded on them. Even if the original grant was of a permanent character, the grantee and the grantor's representative solemnly declared the *istemrari mokurari* to be a grant for life for maintenance, and a family arrangement was arrived at and given effect to by a decree of Court on this basis. The defendant is certainly bound by these documents. In them the villages are said to be *deorhi mouzahs* granted by Raja Perlhad Sen for maintenance for her life, the income being Rs. 3,000, and *prima facie* as maintenance *mouzahs* they were granted for her life only. Rani Nowruchi Debi had under the *ekrarnamah* no right in them "with the exception of receiving maintenance by holding possession during her lifetime." But as the

sum of Rs. 3,000 per annum was thought to be insufficient for her maintenance, the deficiency was made up by grant of additional villages for the use of the profits for her life. It was expressly stipulated that all these villages, the deorhi as well as the added villages, were to revert to the Raj after the Rani's death. In the schedule to the decree, Parsi and Gidha, as well as the other villages, are said to have been allotted to the defendant (Rani Nowruchi Debi) for her maintenance. The decretal order in suit No. 8 of 1888 directed that the plaintiff should recover "possession of the entire disputed property with the exception of the former deorhi mousahs as well as other deorhi mousahs allotted by the arbitration award to the defendant for her maintenance for life without any power to transfer them."

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We are clearly of opinion that the effect of the arrangement evidenced by the ekrarnamahs and the petition of compromise and the decree is to supersede the original grant by Raja Parlhada Sen, even if it were of a permanent character, and to create a new title in favour of Rani Nowruchi. There can also be little doubt, as we have already found, that this new title was substantially the same as the one superseded.

The learned vakil for the appellant has argued that the decree in suit No. 8 of 1888, in so far as it deals with the deorhi villages, is inoperative, and he has referred us to s. 375 of the Code of Civil Procedure. But these villages were intended to be dealt with by the suit, and the plaintiff had claimed rent with respect to them. They were not outside the suit. We think the ekrarnamahs, the award of the arbitrators and the petition of compromise even without the decree are binding documents. We see no valid reason to give effect to the contention of the learned vakil.

The grounds urged before us are of no avail, and we therefore affirm the decree of the Court below and dismiss this appeal with costs.

Appeal dismissed.

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29, 30, 31, and
August 1, 4, 6,
7, 8, and 22.

Land Acquisition Act (I of 1894) ss. 6, 7, 8, 9 (2), 11, 39, 40, 41, 48 & 50 (2)—Owner—Land—Notice of enquiry—Government, power of to acquire property for a Company—Land Acquisition Act proceedings by Collector—Jurisdiction—Collector holding enquiry, whether a judicial officer—Injunction—High Court, power of to question validity of land acquisition proceedings—Civil Procedure Code (XIV of 1882, s. 424)—Plaint, amendment of—Damages, suit for.

S. 424 of the Civil Procedure Code relates to the institution of a suit against the Secretary of State.

There is nothing in the law to show that in case of any amendment, necessitated by alleged discovery of facts previously unknown to the plaintiff, the Secretary of State should have a further notice of two months.

No notice of action is required against the Sub-Collector, who is joined in the action with the Secretary of State, inasmuch as he is not sued for any act done by him independently of the Government.

The jurisdiction of the Land Acquisition Collector extends under the Act over several districts, and he has power to hold his sittings at the office to which he was posted. When provisions of law are clear, it is not competent to Courts of Justice to enter into questions of natural justice and, having regard to the economy and social conditions of the country, the provision that the Government should be the sole judge of what is likely to prove useful to the public is both expedient and useful.

In making an acquisition the wishes of the owner of the land are wholly irrelevant under the Act.

There is no definition of a "public purpose" in the Land Acquisition Act, nor any limitation regarding what is likely to prove useful to the public: both matters are left to the absolute discretion of the Local Government, and it is not competent for this Court to assume to itself the jurisdiction to impose restrictions on this discretion by holding, that at an enquiry under s. 40 of the Act, the person whose land is intended to be acquired, should have an opportunity to appear and object. This is a course wholly contrary to the policy of the Act.

S. 40 of the Act constitutes the Government custodian of the public interests and sole judge as to whether the land is required for the construction of work,

* Original Civil Suit No. 349 of 1901.

and whether that work will prove useful to the public. This Court is not competent to question the validity of the proceedings under s. 40 of the Act.

It is not open to this Court to discuss the sufficiency of the enquiry made by the Collector, or his qualifications. The Local Government is sole judge.

S. 41 of the Land Acquisition Act makes the Government sole judge of the manner in which the public are to have the use of the land taken up.

A Collector holding an enquiry under the Land Acquisition Act is not a judicial officer, nor is the proceeding before him a judicial proceeding. He acts as the agent of the Government for the purpose of acquisition, clothed with certain powers to require the attendance of persons to make statements relevant to the matters which he has to enquire into.

Durga Dass Rakhit v. Queen Empress (1) followed.

Neither the enquiry nor the proceedings held by the Land Acquisition Collector are invalid.

There is no provision under s. 39 of the Act that the consent of Government should be given after the agreement is executed, and that such consent should be notified by a resolution in the Gazette.

THIS was a suit brought by the plaintiff, J. E. D. Ezra, against the defendants, the Secretary of State for India in Council, Mohanundo Gupta, the Deputy Collector of the 24-Pergunnahs, and the Bank of Bengal, asking that the declaration and all proceedings, including the award da'ted 28th December 1900, be annulled; that the defendants be restrained by injunction from taking any further steps to acquire possession under the Land Acquisition Act, of the premises No. 1, Esplanade Row, West, and Nos. 1 and 2, Strand Road, South; and that either one or the other of the defendants other than Mohanundo Gupta be ordered to pay to the plaintiff the sum of Rs. 15,000 as damages for costs incurred by him in the conduct of the proceedings before the Land Acquisition Collector.

The following are the facts of the case:—

The defendant, the Bank of Bengal, a Company incorporated under Act XI of 1876, were anxious to extend their premises for the purpose of providing accommodation for the Public Debt Office, and applied to the plaintiff, the owner of the adjacent land, for the purchase of them, but on account of the price asked by the plaintiff being considered excessive, the defendant Bank applied on the 19th August 1900 to the Government to acquire the

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land for them under the Land Acquisition Act, and expressed their willingness to enter into the agreement with the Government which is required under the Act.

On the 30th of July the Government requested the Board of Revenue to appoint their Secretary, who was at that time Mr. Carlyle, to hold an inquiry under s. 40 of the Land Acquisition Act, which was done, and he submitted a report of his enquiry to the Government. On the 3rd of August the Government being satisfied that the proposed acquisition was for the construction of a building and was likely to prove useful to the public, so informed the Board of Revenue, and asked them to call upon the Bank to submit a draft deed to the Government. This was done, and on the 14th of August the Government communicated their approval to the Bank of Bengal.

A preliminary estimate was then made out by B. C. Mitter, the Land Acquisition Collector at that time, which showed the probable cost, inclusive of statutory allowance, as Rs. 2,63,949. This estimate was on the 27th August returned to the Collector for recorection, and a plan of the land was called for. On the 31st August the Board of Revenue resubmitted the estimate made by the Collector for the sanction of the Government with a revised declaration, and pointed out that the estimate of the Bank at Rs. 2,42,000 was different from the estimate made out by the Collector.

On the 3rd of September a notification was issued by the Government embodying the terms of the agreement entered into on the 31st of August between the Secretary of State for India in Council and the Bank, and the Government on the 5th of September 1900 published their notification in the local Gazette. The Government then issued their declaration under s. 6, and published it in the *Calcutta Gazette*, and also published the agreement in the *Gazette of India*.

On the 3rd of September the Local Government gave their sanction to the estimate of costs which had been submitted by the Collector, and requested that steps should be taken for acquiring the land.

The Secretary to the Board of Revenue then instructed Ganga Charan Chatterjee, Land Acquisition Deputy Collector at



that time, to begin the land acquisition proceedings at once, and notice of the pending proceedings was issued on the plaintiff by the Deputy Collector.

The proceedings by the Deputy Collector began on the 7th of September and ended on the 28th of the same month, and he made his award fixing the value of the property at Rs. 2,63,313-4.

On the 8th of January 1901 the Deputy Collector tendered the amount to which the plaintiff was entitled, but on the 16th of the same month received a letter from the plaintiff's solicitors intimating that the plaintiff would not accept the amount awarded.

On the 22nd of January the plaintiff, through his solicitors, wrote to the Land Acquisition Collector, stating that the Government were not authorized under the Act to acquire the property of the plaintiff for the Bank of Bengal, and asked him not to take steps to acquire possession, as the plaintiff was prepared to take the necessary steps to prevent their proceeding further in the matter. The plaintiff on the 5th of February applied for a reference to the Civil Court, and that reference is still pending.

On the 21st February, the Board of Revenue directed the Deputy Collector to defer taking possession. Various letters passed between the parties, and the plaintiff on the 15th of May 1901 instituted this suit.

The plaintiff in his plaint stated that no enquiry or report was ever made by the Secretary to the Board of Revenue, and that the consent was given by the Government before any agreement had been entered into between the Government and the Bank. He alleged that he was entitled to notice of any enquiry held, and that the consent and subsequent proceedings under the Act are wholly invalid; that it is not competent for the Local Government to make any acquisition for a Company; that such work is not a work of public utility within the meaning of the Act. That the extension of the premises of the Bank is not a public purpose within the meaning of the Act, and that the declaration is wholly invalid and the agreement illusory; that an acquisition of premises by the Government for a Company cannot be legally made, and that the words "for a public purpose" in

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the declaration were inserted fraudulently and falsely; that the Deputy Collector had no jurisdiction sitting at Alipore to take proceedings for the acquisition of premises situated in Calcutta under the Land Acquisition Act; that in consequence he had suffered great loss owing to the acquisition proceedings, and claimed Rs. 15,000 as damages in respect of such loss.

The defendant, the Secretary of State for India in Council, in his written statement, stated that the plaintiff is not competent to maintain this suit against him, and that this Court has no jurisdiction to grant any portion of the relief claimed by the plaintiff.

He denied that the agreement is illusory, and submits that it is perfectly valid, and the declaration under the Land Acquisition Act is good and sufficient; that the sufficiency of the enquiry cannot be questioned by the plaintiff in this suit.

He denied that any words were falsely and fraudulently inserted in the declaration. In a further written statement the defendant, the Secretary of State for India in Council, stated that under s. 424 of the Civil Procedure Code this suit is not maintainable; that the enquiry and award were legally and properly held and made in accordance with the provisions of the Land Acquisition Act.

The defendant, Mohanundo Gupta, in his written statement pleaded that he took no part in the land acquisition proceedings, and submitted that under s. 424 of the Civil Procedure Code this suit is not maintainable against him.

The defendant, the Bank of Bengal, in their written statement stated that the sufficiency of the agreement required under ss. 39 and 41 of the Act, is a matter which is entrusted to the Local Government, and that such decision is a ministerial act which cannot be reviewed by a Court of Justice; that the declaration is a good, sufficient, and valid declaration under the Act, and that the premises in suit were needed for a Company, namely, the defendant Bank of Bengal; that such declaration was published and was needed for a public purpose, and they submit that such declaration is conclusive evidence that the premises are needed for a public purpose. They deny that the words "for a

public purpose" were inserted falsely and fraudulently, and leave the construction of the declaration to the Court.

They deny that the Deputy Collector was an officer of their Bank, and state that it was not necessary for the purpose of the acquisition of the premises that he should be. They contend that the defendant, Mohanundo Gupta, has been wrongly and unnecessarily added as a party defendant to the suit; that the proceedings for the acquisition of the premises in suit are under the Land Acquisition Act good and valid, and that the said award made thereunder is now final, and they are entitled to be placed in possession of the premises.

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The following issues were settled by the Court:—

- (1) Has this Court jurisdiction to entertain this suit or to enquire into and determine the validity of the proceedings taken by the Government of Bengal for the acquisition of the premises in suit, or to enquire into and determine the sufficiency of the agreement under s. 41 of the Act?
- (2) Is this suit maintainable, regard being had to s. 52 of Act I of 1894?
- (3) Does the plaint disclose any cause of action against Mohanundo Gupta, and is he a necessary party to the suit?
- (4) Can this suit be maintained against Mohanundo Gupta in view of s. 424 of the Code?
- (5) Can this suit be maintained against the defendants, the Secretary of State and Mohanundo Gupta, in respect of matters set forth in the amended paragraphs 23 to 26 of the plaint in the absence of the notice under s. 424?
- (6) Was there any enquiry and report under ss. 40 and 41 of the Act?
- (7) Was the enquiry under s. 40 of the Act (I of 1894) a proceeding which this Court is competent to review?
- (8) Was the plaintiff entitled to an opportunity of appearing and showing cause upon such enquiry, and what is the effect of his not having had such opportunity?
- (9) Is this Court competent to determine the legality of the proceedings before the Collector and the award thereon?

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- (10) Were the proceedings taken by the Government of Bengal for the acquisition of the premises invalid for the reasons alleged by the plaintiff?
- (11) Was the plaintiff ignorant of any of the said proceedings, and has he not acquiesced therein, and has he waived any right he has to object thereto, and is he estopped from objecting thereto?
- (12) Are the enquiry before the Land Acquisition Collector and the award by him invalid for the reasons alleged by the plaintiff?
- (13) Was the award made in good faith, or was it made in fraud of the Act?
- (14) Is the declaration conclusive as to the nature and the purpose for which it was sought to acquire the premises?
- (15) Did the defendants threaten and intend to take possession of the premises in suit and eject the plaintiff therefrom under the Land Acquisition Act?
- (16) What damages, if any, has the plaintiff suffered?

Mr. Pugh (with him *Mr. Jackson*, *Mr. Sinha*, and *Mr. Knight*) for the plaintiff.

The original defendant in this case was Chatterjee: in succession to him Mohanundo Gupta was substituted. The plaintiff asks that a declaration (dated 2nd September 1900) and all proceedings, including the award (dated 28th December 1900), be annulled, that the defendant be restrained by this Court from taking any steps to acquire possession under the Land Acquisition Act.

Regulations I of 1824 and XXII of 1863 were followed by the Act of 1870 and then the Land Acquisition Act (I of 1894).

See also ss. 2, 6, 7, 38, 39, 40, 41 of Land Acquisition Act.

What the Government propose to do is to acquire this land for the purposes of the Bank of Bengal.

Government cannot, as regards every Company, undertake to provide them with land. The same thing would apply to any of the other banks in Calcutta. If any of them applied,

the answer to them would be that it was not a work within the scope of the Land Acquisition Act. How then can it be said that the Government can put the Land Acquisition Act in force in order to deprive me?

The matters to be provided for under s. 41 of the Land Acquisition Act are five in number—

- (1) The payment to Government of the cost of the acquisition.
- (2) The transfer, on such payment, of the land to the Company.
- (3) The terms on which the land shall be held by the Company.
- (4) The time within which, and the conditions on which the work shall be executed and maintained.
- (5) The terms on which the public shall be entitled to use the work.

The fifth provision is very strong, the words of which are wholly inappropriate to a bank. I rely upon that as showing that it is entirely inapplicable.

Section 42 is not important. Ss. 43 and 44 have no application with regard to this.

We can find no trace of consent here.

We applied to the Government. They declined to furnish us with anything. After the enquiry was held and agreement made, no consent was given. We challenge the other side as to this.

Section 6 is subject to the provisions of part VII, which must be in the case of an acquisition by the Company.

Here, they say, the costs of acquisition must be paid by the Company. Clause (3) of s. 6 is the only matter with regard to which the declaration is conclusive, and it will be conclusive, if required for a public purpose at the expense of the Company.

The Bank of Bengal say that as it is required for a public purpose that is conclusive, but that cannot be.

Section 9 provides for notice given to persons interested. The plaintiff had notice under this section, and has proceeded to do what is required under s. 10. Under s. 11 a serious question arises

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as to whether it is to be an award by the Collector, and whether he decides judicially, or by Government with the sanction of the Bank of Bengal, or whether the Collector is to decide the compensation judicially from evidence before him.

The function of a Collector in making an award is of a judicial nature.

Under s. 12 the award is to be conclusive as to the value of the land.

Section 14 gives the Collector power to summon and enforce the attendance of witnesses and production of documents, and as to this it must be a judicial enquiry.

Sections 23 and 24, again, show that the Collector has to form his decision judicially.

Section 15 has apparently been overlooked by the other side.

We assail the whole proceedings as to the enquiry before the Collector, and say they are bad from beginning to end.

The Government estimate as to what is to be paid, and the Bank of Bengal furnish the Collector behind our back with certain evidence of the valuation of the land. The Collector has been guided by the sanction estimated, and the Bank of Bengal have provided him with the estimate of value. See *Maharaja Luchmeswar Singh v. The Chairman of the Durbhungah Municipality*(1).

I ask the Court to look at the matter as a whole, and see whether this is not a colourable evasion of the Act.

The Government say they have gone to Court to get the property at a lower price than what we were willing to sell it for. In order to take the land, Government must strictly follow the powers given by the Act, see *Webb v. The Manchester and Leeds Railway Company*(2).

The notice required under s. 52 of the Act must be taken in connection with s. 424 of the Civil Procedure Code.

The defendants complain that they have not had notice under s. 52 of the Land Acquisition Act. They have had three months' notice? How can they object to not having had notice under

(1) (1889) L. R. 17 I. A. 90, 96.

(2) (1888) 4 Mylne and Craig. 116—18.

s. 52? See *Bal Mokoond Lall v. Jirjudhun Roy*(1). The judgment in this case has never been questioned, and is cited in O'Kinealy's Civil Procedure Code, p. 613, as an authority. There is nothing in the Code to say that where notice has been given no plaint can be amended.

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It is acquired for the purpose of the Bank of Bengal. A thing like this would never come within a public purpose. See *Dolan v. Macdermot*(2). That is very much in accordance with the view taken by the Legislature here in 1824; see *Re Sion College v. Exparte The Mayor and Corporation of London*(3). When this case came before the Appeal Court(4), the Judges held that this was not of a public nature. The Bank of Bengal said it was for a public purpose and for a Company. They profess to have followed s. 7. See *Howard v. Earl of Shrewsbury*(5). This case, and *Maharajah Luchmeswar Singh v. The Chairman of the Durbhungah Municipality*(6), I ask the Court to take together. It makes no difference as to whether the amount is large or merely nominal, as in the last case above-mentioned.

My next point and proposition is that, where a person or body of persons seek to take from a man his house or land under authority of an Act of Parliament, they must show they have strictly complied with the letter of the Act. That is a proposition which has been laid down by many Judges; see *Webb v. The Manchester and Leeds Railway Company*(7) and *The East and West India Docks and Birmingham Railway Company v. Gattike*(8). The latter case comes under the Land Clauses Consolidation Act.

Where a Company has got a private Act and seeks to come under the Land Clauses Consolidation Act, then it is the same case as a Company in India seeking to come under the Land Acquisition Act; see *Parker v. The Great Western Railway Company*(9). Government has no power to acquire land for any other bank in Calcutta; is there any difference between this bank and others, which will give the Government that power? I have

(1) (1883) I. L. R. 9 Calc. 271—77.

(5) (1866) L. R. 2 Ch. App. 760.

(2) (1867) L. R. 5 Eq. 60—62.

(6) (1889) L. R. 17 I. A. 90—96.

(3) (1886) 55 L. T. N. S. 589—90.

(7) (1838) 4 Mylne and Craig. 116.

(4) (1887) 57 L. T. N. S. 743—5.

(8) (1851) 20 L. J. N. S. 217.

(9) (1846) 7 M. and G. 258—288.

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not argued that they are not a Company within s. 6, but when Government is going to get property for a Company they cannot within the scope of the Act acquire property for the Company, or for the purpose of a hotel, stores, or for any Bank.

They say it will be for the public utility, or likely to prove useful to the public. Those words are not complied with, unless they are completed as under the Act of 1863. I say they are not Acts for public utility within the meaning of the Act at all; see *Herron v. The Rathmines and Rathgar Improvement Commissioners*(1). Where the Legislature has given Government power to take property from a person, Government must go strictly by the powers in the Act.

The Legislature does not cease until all these things are fulfilled. My case is that they are not fulfilled, and are not in accordance with the Act. No one has ever heard of the Government interfering with stores, or a Company, when buying land.

If a person wanted to build a house for himself and give the public the benefit of coming to it for business, Government could not say that it would be for the benefit of the public, and would not have power to take it from the man using it himself in order that another man might use it for business purposes. That would not be for the benefit of the public. In a case of interference with private rights and taking away a man's property, whether it is a private Act or a public Act, you must follow out strictly the requirements of the Act; see *The Corporation of Parkdale v. West*(2), and *The North Shore Railway Company v. Pion*(3).

Where a Company has power to take land, whether it is for the benefit of the public or not, they must strictly follow the provisions of the Land Acquisition Act.

There are other cases to show that in matters of this kind they must be construed against the person, who requires to take the land; see *Clowes v. The Staffordshire Potteries Water-works Company*(4), *Scales v. Packer*(5). See also Cripps on Compensation, page 111, and Maxwell on Statutes, 3rd ed., p. 419.

(1) (1892) A. C. 498.

(3) (1889) L. R. 14 A. C. 612.

(2) (1887) L. R. 12 A. C. 602.

(4) (1872) L. R. 8 Ch. App. 125.

(5) (1828) 4 Bing. 448, 52, 53.



It is not a matter confined to the promoters of private acts. I rely on the principle, that if you are going to take a man's house, you must act strictly within the Act.

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As to what is the meaning of an enquiry under the Land Acquisition Act, see ss. 40 and 41.

It is contrary to every principle of justice to say that you can take a man's land without giving him an opportunity of stating what he has to say in the matter.

If the act is a ministerial act, the Court has power to issue a mandamus or injunction to prevent the performance of it. Unless the Act says that property can be dealt with without persons having a right to be heard, such persons must have an opportunity of being heard. And of shewing cause whether they can keep the land which is required by Government or not. It must be an enquiry where the parties have an opportunity of being heard and showing cause. With regard to enquiries where there is no Act you can interfere without showing cause. Under the Public Health Acts you have enquiries held in the same way. Even where in Acts it is not expressly stated that a person shall have an opportunity of being heard, yet he will be allowed to be heard. Local Boards Act, 1879, Part IX.

What they seek to do by these Acts, and it is the same by this Act, is this. They give ample power to the Inspector or enquiry officer to hear the enquiry. If the Local Government Board can only give their consent after enquiry, I put it that the enquiry must be one in which a person shall have an opportunity of stating his objections. S. 17 of the Land Acquisition Act seems to be peculiarly limited. The question as to Government being satisfied comes in s. 41.

The Company have a right to appear, but it cannot be said that they are the only parties having a right to appear.

Where Government has to be satisfied that a man's house ought to be taken from him, he has a right to show cause, unless prevented by express words or by necessary implication. If

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they are satisfied, the next step they would take would be to have an agreement. After the agreement is executed, there must be a consent. Consent under s. 39 is a different thing to the agreement put by the Bank. Consent must be subsequent to the agreement. If I am right that Government must consent, then, after the agreement has been signed, the consent must be expressed.

See *Labouchere v. Earl of Wharnccliffe*(1).

The enquiry in that case covers the case as to whether it is for a public benefit. The point is that he will be injuriously affected; see *Cooper v. The Wandsworth District Board of Works*(2), and *Dawkins v. Antrobus*(3). These two cases are important upon the point as to ministerial acts as well as judicial. With reference to partition, see *Russel v. Russel*(4), *Fisher v. Keane*(5), and *Blisset v. Daniel*(6).

You cannot take away from a man his right or franchise without giving him notice; see *Thorburn v. Barnes*(7) and *In re Hammersmith Rent-charge*(8).

Broom's Legal Maxims, pp. 106 to 109.

As to cases dealing with the difference between ministerial and judicial acts; see *Painter v. The Liverpool Oil Gas Light Co.*(9), *Abley v. Dale*(10) and *Williams v. Bagot* (11).

Payley's Summary Convictions, p. 20.

The case of *Harvey v. Shelton*(12) is important in considering the relation between the arbitrator, Government, and the Bank of Bengal.

The Collector has to make an award which is done by an arbitrator, and if he has got to decide and make an award, he has to be guided judicially; he is not described as an arbitrator, but

(1) (1879) L. R. 13 Ch. D. 346.

(2) (1863) L. R. 14 C. B. N. S. 180.

(3) (1881) L. R. 17 Ch. D. 615—31.

(4) (1880) L. R. 14 Ch. D. 471.

(5) (1879) L. R. 11 Ch. D. 353.

(6) (1851) 10 Hare 493.

(7) (1866) 2 C. P. 384—401.

(8) (1851) 4 Ex. 87, 96.

(9) (1837) 3 A. & E. 433.

(10) (1850) 10 C. B. 62.

(11) (1825) 3 B. & C. 772.

(12) (1846) 7 Beav. 455—62.

he has, as Collector, been called upon to make an award, and he has to come to a judicial finding. The Collector has to make an award, find what the value is, and has to take the evidence. Both parties must be heard before the previous enquiry for award; see *In re Brooks*(1) and *Staviton v. Ashburton*(2). The Bank of Bengal contend in paragraphs 11 and 15 of their written statement that these acts are ministerial, and it is raised by the Advocate-General in his issues in the same way. As regards none of these things are they ministerial acts.

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As regards judicial acts, there the Court has greater authority. The question of ministerial acts does not arise here, because the proceedings are judicial.

I do not know the distinction which they draw between ministerial acts and administered acts; see *Ellis v. Grey*(3).

The question as to whether Government can be sued is important. The Deputy Collector is appointed for many districts; can he deal with acts arising in another district?

It may be said that this was a kind of local jurisdiction but, if that be so, he would have to be appointed specially for each district. If appointed in Calcutta, he must hold enquiries relating to Calcutta properties in Calcutta. He must act within the limits of the jurisdiction in which the land is situated.

In order to make out a case of waiver, you must make out a case of a man having a knowledge of his rights and knowing of them; see *The Earl of Darnley v. The Proprietors of the London, Chatham, and Dover Railway*(4). A waiver must be an intentional act with knowledge. That is the point I rely on in quoting the above case.

It is said as regards officers of Government, like the Deputy Collector, that they are not liable, and this is based on the maxim "*Respondat superior*." Another proposition of the other side is that the Government is not liable for the acts of its superior

(1) (1864) 16 C. B. N. S. 403 - 16.

(2) (1856) 4 E. & B. 526—31.

(3) (1886) 6 Sim. 214.

(4) (1867) 2 E. and L. App. 48.

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officers and cannot be sued; see *Rogers v. Rajendro Dutt*(1) and *Raleigh v. Goschen*(2). The above two cases show conclusively that the Deputy Collector would be liable; see *Walker v. Baird*(3).

As regards the Secretary of State, any act done by the Legislature is an act of State, and the Court cannot take cognizance of it, but where the Secretary of State acts under the provisions of municipal law, then they are liable. Ilbert's Bk., pp. 172-73. With regard to that there are a number of cases which have been decided in the Privy Council; see *Forrester v. The Secretary of State*(4) and *Nobin Chunder Dey v. The Secretary of State for India*(5).

The other side have stated about administrative acts. If these acts are done under colour of municipal law, I say they are liable.

They will say that the Secretary of State is not liable for acts of the Government of Bengal. What I maintain is that he is liable. As to the Land Acquisition Act, it is a matter of municipal law, and is a matter which is quite simple. Maine's Criminal Law, p. 299 (para. 87) and 300.

Mr. J. T. Woodroffe, the Advocate-General [with him *Mr. J. G. Woodroffe (Offg. Standing Counsel)*]; for the defendants.

I do not propose to deal with the cases cited by the plaintiff in detail. The question is as to the construction of the Land Acquisition Act of 1894, and any consideration of Acts prior to this is not only useless, but misleading. I rely upon the judgments of *The Administrator-General of Bengal v. Prem Lall Mullick*(6) and *Norendra Nath Sircar v. Kamalbasini Dasi*(7) as to the uselessness of this discussion. The same decision is laid down in several cases; see *Robinson v. The Canadian Pacific Railway Company*(8). In the Land Acquisition Act there is no definition of a public purpose. I submit that the cases under the Land Clauses Consolidation Act furnish no guide to the meaning of the Land Acquisition Act of 1894, because the act is

(1) (1859) 8 Moore's I. A. 103—130.

(2) (1898) 1 Ch. 73—78.

(3) (1892) A. C. 491—95.

(4) (1872) L. R. I. A., Supp. Vol. 10.

(5) (1875) I. L. R. 1 Calc. 11.

(6) (1894) L. R. 22 I. A. 107.

(7) (1895) L. R. 23 I. A. 18.

(8) (1892) A. C. 481.

wholly based on the Act in England. Private acts or acts of a local character have no bearing ; see Maxwell on Statutes, p. 419. The various cases described under the head of club cases have no dealing with the Act this Court will have to interpret.

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In this country the Act which solely regulates acquisition is Act I of 1894. Under it the Local Government is solely vested with the power of determining whether they can acquire property. It is left to the Local Government to determine what a public purpose is. S. 6, Land Acquisition Act.

It is clear that when once a declaration is made, and land is needed for a Company, that the declaration necessarily involves this, that the requirements of Part VII have been complied with. When there is such a declaration it must be taken that the Government was satisfied in that respect.

When the Legislature has instructed the Local Government to represent the lower classes, can an individual say that the Government was satisfied, but he is not satisfied? That is a position which is not maintainable. When the Legislature has given them that power, I submit that so long as a public functionary, for example, the Local Government, have confined themselves within the exercise of their duties defined by the law, the Court will not interfere. The case of *Ellis v. Grey*(1) was cited by the other side, and supports the proposition I have made. Kerr on Injunctions (3rd ed.), p. 4.

I ask the Court to consider what is the position of the plaintiff in this case. Suppose the land is to be taken up for a public purpose, has the plaintiff any voice in the matter as to whether it is for a public purpose or not? I submit none whatever. The question Government has to consider is whether the land is for a public purpose. If they think so, they issue a declaration under s. 16 of the Land Acquisition Act. No notice need be given to the other side at all. If steps are taken under that declaration, the land is taken over and he gets the fair price of that land with a solation of 15 per cent. for the mere fact that the land is acquired. There is no injury.

(1) (1886) 6 Sim. 216.

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If land is sought for a Company, who is it who is acquiring the land? The Government. The land is to be acquired, if the Government consider it should be so. The agreement was entered into between the Government and the Bank of Bengal, and it is admitted that the Bank of Bengal discharges certain duties for Government, such as the Public Debt Office. If the Bank assumed that duty for themselves, would it not be for a public purpose? How does it differ if Government does not do it, but chooses to do it through the instrumentality of the Bank of Bengal? If Government took a piece of land to-morrow for the purpose of an Army clothing building, the fact would still remain that it could still change its mind for the use of such land.

There is no form prescribed in s 6 of the Act for a declaration; it is sufficient, if it is so worded, that upon the face of it you show it is needed for one or the other or both. The Bank of Bengal contends that the land was taken up both for a public purpose and for a Company. The argument of the other side is that land can be taken up for a Company or for a public purpose, but it cannot be taken for a Company for a public purpose. That argument is not maintainable. Why should it not be taken up for both?

This declaration is by virtue of s. 6, sub-section 3, conclusive evidence that the land was taken up for a public purpose as well as for a Company. It may be that the provision of Part VII of the Act will have to be seen to so far as a Company is concerned.

The plaintiff says it is bad because it was for a public purpose, and then goes on to say that it was for the benefit of extending the Bank of Bengal. There is nothing to show that land acquired by the Government for the Bank of Bengal for a Public Debt Office is not for a public purpose. If that ground be abandoned and it be argued that the land was taken up for a Company for a purpose that the public are interested in, then I come to the consideration of Part VII of the Act. The proceedings in the Lower Court were proceedings under Part VII.

The plaintiff's contention is that this declaration is bad and is fatally defective because it states that the land is for a public purpose, and proceeds to specify that purpose, namely, that it is for the extension of the Bank of Bengal. Subsidiary to that

contention, the plaintiff raised this, that the land could not be acquired for a Company, nor the Bank of Bengal under any circumstances, as they have means under their own Act for acquiring the property, and, further, that the land was not needed for a work likely to prove beneficial to the public.

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There is no part-form required by the Act for a declaration, and as soon as the declaration is proclaimed, the course proceeds, whether it is for a public purpose or for a Company, except that in the latter the cost defrayed must be by the Company. The only object of the declaration is to inform that the Government is satisfied that they acquire the land for a public act.

When land is taken for a public purpose, the Government is deemed to be acting for the benefit of the public when doing so, and the initiation rests with the Government. When land is acquired for a Company, the Legislature requires Part VII of the Act to be enforced, that is, for a public purpose. In this case it cannot be disputed that the land was required for a public purpose, namely, for the Public Debt Office.

The distinction between land acquired for a public purpose and for a Company does not exist. It is not denied that the Bank is a Company within the meaning of s. 3 of the Act, and it was not contended that, if the Company is one under s. 3, and they have their own Act, that they cannot take it up. That has not been seriously taken up. Negotiations between the Bank and the plaintiff were not brought before the Secretary of State.

There can be no want of good faith, if, where persons are not able to agree, one should apply to the Government. Persons often put in an exorbitant sum for land, and in this case the plaintiff has claimed five lacs of rupees. I leave that matter, however, to the Court.

It is quite clear that the Government was capable of acquiring land for a Company, and for this Company, and nothing that has been proved in this case can alter that. The consent of the Government is to be given before ss. 6 and 37 of the Act are put in force. There is nothing in the Act stating in what form consent is given. The consent must be however given previous to the proceedings. S. 40 of the Act (I of 1894) referred to.

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It is objected here that the plaintiff was entitled to have notice, so as to have an opportunity of being present at the enquiry. Is there anything in the Act to warrant such contention? There is no such notice required by the Act. The plaintiff says that the notice is an implied one. Is there any ground for stating that?

If Government after enquiries made resolve that the land shall be taken up for a Company, the plaintiff has the fullest opportunity of being heard as to the area, value, share, and rights to the land, plus certain statutory allowance. As to when notice is to be given, the Court will be able to see by referring to ss. 4, 6, and 9 of the Land Acquisition Act.

Under s. 12 we get a change from this Act from what there was in the preceding Act, and an award can be made under this section whether the persons interested are or are not present, when the award is made. S. 20 and various other sections provide that, where the Legislature considered notice should be given, provision should be made as to that. The Company asking to put the provision into force should have an opportunity of showing that their reason is a reasonable one. The provisions under ss. 3 and 40 do not arise in this matter.

It has been decided by this Court that only a person who can administer the oath under this Act is a Court.

The object of an enquiry is for the protection of the public.

The officer, who is making the enquiry under s. 40, is not a judicial officer, and if it be not a judicial enquiry, on what ground, then, has the owner of the land to be entitled to be represented in this enquiry? Why should the owner of the land have notice when the Act makes no provision for such notice? I submit that, if the matter is open to the Court to enquire into anything prior to the declaration under s. 6, which I submit not, it must be taken that the proceedings have been legally and properly carried out, and that the owner of the land is not entitled to notice.

The plaintiff has no right to be present at the enquiry. Both the results of the enquiry and the nature of the agreement are left solely and entirely upon the Local Government. Therefore



I contend that the plaintiff cannot impugn the proceedings either upon the ground of want of notice, or because they have not been carried out under the provisions of the Act.

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The Government have deliberately stated that they approve of this declaration and grant it. On the question of the declaration being binding, see *Shastri Ramchandra v. Ahmedabad Municipality*(1). The object of the declaration is to show that the land is needed, and it is sufficient for the declaration to state that it is so required.

With regard to the proceedings by Gunga Churn Chatterjee, the first question urged by the plaintiff is, that although he was appointed with powers of the Land Acquisition Collector in respect of land, yet he could not do so in the 24-Pergunnahs, and it is suggested that that is a defect in the jurisdiction. No objection of this kind was taken before the Collector, and no authority has been cited that he could not sit in the 24-Pergunnahs and perform the acts he could in Calcutta. The process for acquisition for acquiring land in Calcutta has been done in many cases by the Collector in the 24-Pergunnahs. Is it a question of jurisdiction at all?

If there is anything in it at all, they could only speak of it as an irregularity, but where is the irregularity? I submit there is none.

The District Judge of the 24-Pergunnahs is *ex-officio* appointed to be the Court under this Act; see Beverley's Land Acquisition Act, p. 7. In the case of *Durga Das Rukhit v. Queen-Empress*(2), it is pointed out that a Court does not include a Collector.

On these grounds before the plaint was altered and up to the present moment, the plaintiff has utterly failed to make good his claim. In the amended plaint the plaintiff says that whether there was a want of jurisdiction or not, this award is a fraud upon the Act. This is a matter which is not within the notice of action to the Secretary of State, which should also state the cause of action. The plaint as originally drawn said that the award is bad in law, that there was no jurisdiction, that the Government was not

(1) (1901) I. L. R. 24 B.M. 630. (2) (1900) I. L. R. 27 Calc. 820—25.

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competent to make the declaration, and that the provisions of s. 40 and 41 had not been affected. But now they say that there was a fraud committed. I contend that this portion of the plaint is not maintainable under s. 424 of the Civil Procedure Code. No notice of action was given as regards Gunga Churn Chatterjee.

As regards the case of *Bal Mokoond Lal v. Jirjuddun Roy* (1), cited by the plaintiff, I submit that this dictum, for it is nothing more, is no authority for the proposition that a suit cannot be maintained, unless notice is given under s. 424 of the Civil Procedure Code. In *The Secretary of State for India in Council v. Rajlucki Debi* (2), it was held that it not only vitiated the action against the Secretary of State, but as regards other persons also.

Suppose the case of want of jurisdiction breaks down, the plaintiff would be bound to pay the costs of the suit, but now the plaintiff has set up a new case, and it is one that seriously affects my clients, because it is one which goes as against them to charge fraud. Mohanundo Gupta has never had any notice at all under s. 424 of the Code, and the Secretary of State, although they had notice under s. 424, should have had notice again under the above section, inasmuch as the plaint was amended.

The other side has argued that Mohanundo Gupta would be responsible, if he committed an actionable wrong, but if so, then he was entitled to notice under s. 424. He was added at the plaintiff's risk, but how, because he succeeded Gunga Churn is he responsible for what Gunga Churn did? This suit is not maintainable against the Secretary of State, and it is not maintainable against Mohanundo Gupta at all, inasmuch as he had no notice under s. 424 of the Civil Procedure Code.

The questions under the issues allowed to be raised by the Court seem to me to involve the consideration as to what is the position of Gunga Churn, and what is the nature of the award. Firstly, what is the position of the Land Acquisition Collector? He is not a judicial officer. Secondly, what is meant by, and what is the force and effect, if any, of what is called, an award under this Act? The plaintiff argues as if this was an award made by arbitrators. It is nothing of the kind; see Bacon's Abridgment,

(1) (1893) I. L. R. 9 Calc. 271.

(2) (1898) I. L. R. 25 Calc. 239.

p. 265. Did the Legislature use the word in that sense. I submit there is only one answer, and that is that they did not; see Maxwell on Statutes, p. 28. It is quite clear on this Act that there is not, so far as the owner of the land is concerned, any finality in the so-called award, unless and until he accepts it.

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. See ss. 8-11 of the Land Acquisition Act.

See also ss. 23 and 24 of the Land Acquisition Act.

If the Court is of opinion that a sufficient amount has not been tendered by the Collector, then he is liable. The function of the Collector is to decide the amount, which, in his opinion, the plaintiff should be entitled to for the value of the land with the consent of Government, and he is not to decide anything else. The Collector is not bound to make an award upon the estimated value, and in fact he did not do so. It was proper that the Bank should state the amount, which they were willing to give for the land; and if that had fallen short, they would have been liable for costs. The Manual of Rules and Regulations (22nd June 1900) and s. 39 of the Land Acquisition Act referred to. There can be no question that this assessment was made and sanctioned by the Government. The question is whether the award arrived at by the Collector is a fraud against the Act or not. Now what is the fraud? The Sub-Collector was bound under s. 39 of the Act. Could he have done less than what he did, namely, make his report and send the same to the Collector under the Act? The Company by rule 11 of the Rules and Regulations is brought into immediate contact with the Government; see rule 19 of the Rules and Regulations. Though called rules, they are more properly instructions by the Board of Revenue. When fraud is suggested, then it is that these instructions are a fraud, and a fraud to the whole world, as these instructions are published under the heading of Manual of Rules and Regulations. The object of the rules is for protection of the Government and to determine the amount below which they are not entitled to go in assessing the value of the land. On these statements made and these facts proved, I submit they are not entitled to say any fraud has been made out.

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The Government has made no secret of what they have done. I submit therefore no case of fraud has been made out.

If the officer's business is to determine solely the value of the land for the Government, how can he be a judicial officer? If the Collector is not a judicial officer, then there has been no fraud upon the Act. There is no provision made under the Act for the Collector to examine any witnesses at all. Certain witnesses were examined and sworn, but he had no power to do it. As to the general power to fix a day for enquiry, see s. 11 of the Act. The Collector has the power to compel the attendance of witnesses, but has no power to put them on oath.

Mr. Hill (with him *Mr. Dunne* and *Mr. Garth*) for the Bank of Bengal.

The relief sought in this suit is of a threefold character as stated in paras. 1, 2, and 3 of the plaint.

The case put forward in the plaint as amended and the arguments in support of that case are— (1) That the purpose for which these premises were acquired is not such a purpose as justifies their acquisition under the Act; (2) that the procedure adopted for the acquisition was not in accordance with the provisions of the Act, and was in fact a fraud upon the Act. As to the former contention, the plaintiff's case is that the Bank wanted the premises for their private purposes as a Bank, but instead of resorting to their power under s. 41 of Act XI of 1876, which authorises them to acquire an interest in immovable property, they applied to the Government of Bengal to acquire them under the Land Acquisition Act; that under colour of arrangements with the Secretary of State and the Governor-General in Council with reference to the Public Debt Office, they induced the Local Government to take these buildings, but that these arrangements may at any time be put an end to; that the agreement of 31st August 1900 makes no provision for the public user of the building to be constructed after the Bank's arrangement with Government shall cease; that the agreement is wholly illusory, and is quite compatible with the public having no use of the work at all on any terms; that the work is not a work which could for its nature be

used by the public within the meaning of the Act; that the purpose mentioned in the declaration of 3rd September 1900, viz., "for the extension of the Bank's premises," is not a public purpose within the meaning of the Act, and that the defendants should be restrained by injunction of this Court from proceeding to acquire or take and give possession of the premises under such declaration or agreement, or at all.

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Assuming each and all of the plaintiff's statements and contentions above mentioned to be correct (I shall presently show they are not), has this Court jurisdiction to interfere or to grant the injunction prayed?

The Local Government might to-morrow enter into another agreement with the Bank for the public user of the building to be constructed, and might proceed to acquire the premises for the purposes therein stated. Could this Court restrain it? I submit this Court has no jurisdiction, and would not interfere. A *quo warranto* would be refused, if precisely the same thing had been done immediately; see *ex-parte* Richards(1). A *mandamus* cannot be issued when there is a discretionary power; see *The King v. The Lords Commissioners of the Treasury*(2) and *The Queen on the prosecution of Edwards v. The Directors, etc., of the South-Eastern Railway*(3).

The Court cannot interfere by injunction with the public duties of any department of Government or with any discretion it has to exercise in its public capacity; see *Ellis v. Earl Grey* (4).

The arguments based on the provisions of the Land Clauses Acts are misleading. The conditions of compulsory acquisition under these Acts and the machinery thereof being wholly different to that under the Land Acquisition Act. Here no private individual or body of individuals can acquire, but Government, and Government alone, and the Government is made sole judge of the necessity of the acquisition. Its dictum is to be conclusive evidence on the point. Here the Government is charged with ascertaining whether these premises are likely to be acquired for a public purpose and likely to prove useful to the public. How can you restrain Government from exercising their

(1) (1878) L. R. 3 Q. B. D. 368.

(3) (1855) 4 H. L. 471,—78,—82.

(2) (1837) 4 A. & E. 286-97.

(4) (1836) 6 Sim. 214—23.

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discretion which they have under the Act? If the land is acquired for a Company, Government is not to move in the matter, unless they think it is likely to be for the benefit of the public. Therefore all the cases cited by the plaintiff dealing with the Land Clauses Acts are useless.

The Land Acquisition Act, says Government, is to declare whether the land is to be acquired for a public purpose. S. 6, (cl.) 3 of the Act then provides that the declaration is conclusive evidence. How can this Court deal with this?

The plaintiff wants the Court to deal with this case as the arbiter of these points. He says that the declaration is not in accordance with s. 6 of the Act. I shall show that the land is acquired for a public purpose and for a Company. On the face of the declaration it is said to be for the Bank of Bengal. If the Court can enter on this enquiry, then the purpose is a public purpose, and the work is likely to be useful. If Government was managing the Public Debt business by one of its own departments, could it not acquire land whereon to erect a Public Debt Office? If it manages the business by an agent, can it not provide the agent with an office? Would not such provision be for a public purpose? The agency might determine, but that would not affect this.

The declaration and the agreement were duly published, and the public purpose for which the land was acquired was thus made known, and the declaration was neither misleading nor incorrect.

I can show that the building to be constructed was during the continuance of the agency, to be used to provide additional accommodation for the Public Debt Office, and not exclusively for that purpose, but that the Bank might also use portions not needed for that purpose for the general purposes of the Bank, and that to this extent they were used for Government business, and the public were to be entitled to the use of them. The Local Government were of opinion that the building would be likely to prove useful to the public. Was it wrong?

Can it be said that the agreement is compatible with no use at all by the public? The Government did not think so, and it was for the Government to decide on the sufficiency of the

agreement. The agreement has become part and parcel of this Act. How can the Court repeal the Act? That is what the plaintiff asks the Court to do. I submit the Court cannot deal with it. Apart from s. 41, every requirement of the Act was made. As to the enquiry by which Government satisfied itself that the work was likely to prove useful to the public, see s. 114 ill. (c) of the Evidence Act, which says that the Court may presume that judicial and official acts have been regularly performed. What evidence is there to rebut this presumption?

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The plaintiff says he was entitled to notice of, and to be heard on, such enquiry. Is that enquiry one of a judicial nature, and if so, who are the parties to it? The parties concerned are the public and the Company who are seeking to have Government concerned in the matter. The whole object of this enquiry is to see that it is useful and for the benefit of the public. The Government has to fix a time and place for the enquiry. Why? In order that the Company can point out where the works should be, and that it is to be for the benefit of the public.

Where the Act says that the Collector may require the attendance of witnesses, that is merely for information. The Government is not required to give notice to the plaintiff and further, any statement made by the plaintiff might be misleading to the public. The declaration is challenged as misleading. It did not in terms say the premises were needed for a Company, and said they were to be acquired for a public purpose.

The Government appointed the Collector to make an enquiry under ss. 11 to 16 of the Land Acquisition Act. The plaintiff says the appointment was unauthorized and invalid, and that the Collector sitting at Alipore had no jurisdiction to take proceedings for acquisition of land in Calcutta.

The plaintiff says the proceedings are an evasion and fraud upon the Act. This is based on a misconception of the object and nature of this enquiry, owing no doubt in a large measure to the misleading word "award" in the sections of the Land Acquisition Act.

An award is the judicial determination of points in controversy between opposing parties. In Bacon's Abridgment Com. Dig., pp. 265, 289, one finds the essential elements of an award laid

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down, and, amongst others, the elements of mutuality. An award should be certain, mutual, and final. Here there is nothing of the kind.

When a tender is offered by Government, the Collector should come to a decision under the information tendered by Government. What is it that the Collector did that is an evasion of the Act as suggested by the plaint as amended? See the Manual of Rules and Regulations for the guidance of officials under the Land Acquisition Act, p. 39. Where does the element of fraud come in if the Collector should get information from the Bank as to the estimate? Surely he is entitled to such information.

The Collector making the enquiry does not act in a judicial capacity. He cannot administer an oath nor require a verification; see *Durga Das Rukhit v. Queen-Empress*(1). The object of the enquiry is to enable Government as administrators of the public funds to ascertain what is a proper amount to offer; and the so-called award is nothing more than an offer by Government, which the owner is at liberty either to accept or refuse. If he refuses, the Collector is bound to refer to the Court.

The Collector is bound by his offer and cannot claim a reference, nor, when the property is acquired at the cost of a local authority or a Company, can such local authority or company demand a reference. The Collector must, on making his award, tender, and can, if acceptance is refused, deposit in Court the amount offered by him; and if the Judge awards more than the Collector offered, the Collector may be made to pay the costs of the reference. His position is a twofold one, viz., (1) an official valuer to value the premises, and (2) a Government agent to make an offer, and he is nothing else. If he is only an agent to make an offer, where is there anything wrong in the amount he makes? S. 55 of the Land Acquisition Act empowers the Government to make rules consistent with the Act for the guidance of its officers. In the *Darbhanga* case(2) referred to by the plaintiff, there appears to have been no proceedings at all. Here you have parties at arms length, but

(1) (1900) I. L. R. 27 Calc. 320.

(2) (1889) L. R. 17 I. A. 90.



in the above case cited nothing passed. That case has nothing either in substance or in fact bearing on the present case.

*Mr. Pugh* in reply.

The *Darbhanga* case(1) is one in which I place the greatest reliance, and has been dealt with by the Privy Council. With regard to this case, the Chairman of the Municipality were the only defendants. The case was not brought for years afterwards, until the Raja had become of age.

As to fraud, I say that I have never made any charge personally against the defendants.

The difficulties that meet the defendants are legal difficulties entirely. The fact that the award made in the above case was one rupee makes no difference, and I submit that it would be just the same, if it were eight lacs, if the award was not made in compliance with the Act.

In order to see whether the Court has jurisdiction you must see what the nature of the case is. In *Ellis v. Grey*(2) the act which was performed was a ministerial act; see *Frewin v. Lewis*(3). Kerr on Injunctions (3rd ed.), pp. 166 and 568, and Woodroffe on Injunctions, pp. 34 and 35, referred to. The issue as to whether a suit is maintainable, regard being had to s. 52 of the Land Acquisition Act, is a question which cannot be urged on behalf of the Government, because they had notice for over a month. This section applies only to anything done in compliance with the Act. Mohanunda Gupta does not come under the section at all, because, as regards him, what we seek is an injunction to restrain him from taking our house. We ask also for an injunction as against the Bank, and they had the same notice as the Government. Mohanunda Gupta does not come within s. 424 of the Civil Procedure Code. If you want an injunction with regard to an act done, you can do so without giving notice. The Appeal Court decided you could not do so against the Government; so that as regards Government notice is required, which was done. Defendant says that the plaintiff discloses no case against Mohanunda Gupta, which I fail to see.

(1) (1889) L. R. 17 I. A. 90.

(2) (1836) 6 Sim. 216.

(3) (1848) 4 Milne and Craig. 240—54.

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Was Mohanunda Gupta a necessary party? Government says they are not liable for the acts of their servants. Then in that case it is clear that Mohanunda Gupta was a necessary party.

We say the award is a sham, and we challenge throughout our plaint that the award was not done in compliance with the Act. As to whether there was any enquiry or report made under ss. 40 and 41 of the Act, it is said that the enquiry made in this case is a valid enquiry. No notice was given by Government, but the Collector gave formal notice to the Manager of the Bank and interviewed him. How can that be called an enquiry? Has any one ever heard that both sides cannot be heard? How can it be argued that, if you are going to take a man's lands, he is not an interested party, but that he is only interested with regard to compensation? The club cases show that these people are responsible to the Courts. I don't rely entirely upon these classes of cases, but they are all in point with regard to the case now before the Court.

The defendants have not dealt with these cases, because they could not deal with them. The report does not show that this is within the meaning of the Act and likely to be beneficial to the public. Any bank is useful to the public in an indirect way, but you cannot predicate the term.

As to consent, I submit there was no such consent as is required under s. 39 of the Act.

The Collector is a man committed with the task of enquiry into the matter with power to call and examine witnesses. See s. 4 of the Oaths Act.

An award being final, the onus is upon the claimant to show that the award is wrong. In the notes under s. 22 of Beverley's Land Acquisition Act, he says the claimant takes the same position as the defendants. See ss. 15, 18, 22, 23, 25, 26, 27, 29, and 43 of the Land Acquisition Act. I say that the consent to put these sections in force must be after the agreement. I contend that the Deputy Collector must sit in each place, where the land is situated, in order to hold an enquiry. I submit

that the plaint is well founded, and the Court has jurisdiction, and I ask the Court to grant an injunction to prevent the defendants taking this land in these proceedings.

*Cur. adv. vult.*

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**AMRER ALI AND STEPHEN JJ.** The plaintiff is the owner of certain premises in Calcutta, which have been acquired by Government under the provisions of Act I of 1894 (the Land Acquisition Act), and he seeks in this action to have it declared that all the proceedings taken by the Local Government in the matter of such acquisition should be declared void and of no force or effect, and to obtain a mandatory injunction restraining the Government as well as the Bank of Bengal, for whom the land is purported to be acquired, from taking any step whatsoever towards taking possession of the said premises.

He also claims damages for the costs incurred by him in the conduct of the proceedings before the Land Acquisition Collector.

In order to understand the contentions raised on his behalf, it is necessary to set forth in some detail the circumstances under which the Land Acquisition proceedings were instituted.

The Bank of Bengal, which is a Company incorporated under Act XI of 1876, appears to have been in need of extending its premises for the purpose of providing improved accommodation for the Public Debt Office and the Government Accounts Department.

The premises in question being adjacent to the Bank, it attempted, in the first instance, to obtain the same by private purchase from the plaintiff.

Upon the evidence we have no doubt that the solicitor for the Bank broached the subject first to the plaintiff's agent on the 5th of July 1900. The conversation on the subject is detailed by Mr. McNair, who states that Mr. Cohen then told him the plaintiff would not take even four lacs for the property, upon which Mr. McNair replied that in that case there was nothing for it but to acquire the land through the Government. There was a subsequent interview between the Bank's solicitor and the plaintiff's agent, when the latter informed Mr. McNair that he was not

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going to take even four lacs. The Bank considering the demand as exorbitant and unreasonable applied to the Government on the 19th of July 1900 for the acquisition of the premises in question under the Land Acquisition Act. In their letter to the Chief Secretary they mentioned the circumstances which compelled them to make the application, and expressed their willingness to enter into the agreement with Government required by the Act, and they prayed that the necessary steps as required by the law might be taken for the acquisition of the premises.

On the 30th of July the Government of Bengal by their letter No. 2726, addressed to the Secretary to the Board of Revenue, Lower Provinces, requested the Board to depute their Secretary to make the necessary enquiry under s. 40 of the Act and to report the result to Government as quickly as possible.

At that time Mr. Carlyle, who has given his evidence in this case, was acting as Secretary to the Board, and it would appear that, in accordance with the Government's request, he was deputed to make the enquiry.

There is a note on the margin of exhibit B proved to be in Mr. Carlyle's handwriting in these terms—"I will go to the Bank to-morrow as arranged yesterday."

On the following day (1st of August) Mr. Carlyle proceeded to the Bank, and after ascertaining the facts, which he details in his evidence, he submitted a report embodying the result of his enquiry for the information of Government. The original report has been put in and marked as exhibit 5 (the draft is marked as exhibit 4). A great deal of time has been spent in discussing this draft; with what object it is difficult to understand. It appears from the evidence of the plaintiff's attorney that he had obtained a copy of exhibit 4, which was the only report then in the possession of the Government Solicitor; he found several mistakes in his copy and went to the Government Solicitor's office to compare it with the original and apparently to obtain inspection of other documents. Exhibit 4 was shown to him when he mentioned to Mr. Sowton, an assistant of the Government Solicitor, that it appeared to be a draft (which in fact it is), to which Mr. Sowton replied that that was the only report they had in their possession.

Mr. Gregory admits that Mr. Sowton did not tell him that that was the report submitted to Government or that there was no other report. It is not suggested, nor could it be suggested, that exhibit 5 is a subsequent concoction for the purposes of this suit; nor has our attention been drawn to any points of difference between exhibits 4 and 5.

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A great deal of public time, however, has been taken up in the examination and cross-examination of witnesses with regard to the first document.

To proceed with the narration of facts,—from the note made on the draft, as also from Mr. Carlyle's evidence, it is clear that the original document and the plan were handed over personally by this officer to the Secretary to the Government of Bengal in the Revenue Department.

On receipt of Mr. Carlyle's report the Government of Bengal, by its letter No. 2826, dated the 3rd of August 1900 (exhibit No. 3), informed the Board of Revenue that it was satisfied that the proposed acquisition was for the construction of a building, and that such building was likely to prove useful to the public. The Government at the same time asked the Board to call upon the Bank to submit a draft deed for the approval of Government. We shall refer, later on, to certain correspondence which passed about this time between the Bank's solicitors and the Government Solicitor, upon which the plaintiff has placed reliance in support of his allegation that the Government was colluding with the Bank in the matter of this acquisition.

A draft agreement appears to have been submitted by the Bank of Bengal, and on the 14th of August 1900 (see exhibit 7) the Local Government communicated its approval of the draft to the Board of Revenue.

In the same letter a direction was given for the preparation of an estimate of cost for acquiring the land. In accordance with this direction a preliminary estimate was made by P. C. Mitter, Land Acquisition Act Collector at the time, and submitted on the 22nd of August 1900 (exhibit D).

This estimate showed the probable costs, inclusive of the statutory allowance, as Rs. 2,63,949.

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On the 27th of August the estimate was returned to the Collector for the correction of certain mistakes, and at the same time the plan of the land was called for.

On the 31st of August the Board re-submitted the estimate prepared by the Collector for the sanction of Government with a revised declaration.

In this letter (exhibit F) the Board pointed out the difference between the Bank's estimate, which was Rs. 2,42,000, and the estimate prepared by the Collector.

On the 3rd of September the Government issued for general information a notification embodying the terms of the agreement entered into on the 31st of August between the Secretary of State for India in Council and the Bank. This notification was published in the local Gazette on the 5th of September 1900, and refers in express terms to the premises, 1, Esplanade, West and 1, and 2, Strand.

On the same date the Government issued its declaration under s. 6, which was published in the *Calcutta Gazette* of the 5th of September 1900.

The agreement was also published in accordance with the requirements of the Act in the *Gazette of India* of the 8th of September.

On the 3rd of September Ganga Charan Chatterjee was appointed Land Acquisition Collector for the districts of Nuddea, Jessore, Faridpur, and Calcutta, and was posted to the headquarters station of the 24-Pergunnahs.

On the same date (exhibit H) the Local Government communicated its sanction of the estimate of costs submitted by the Collector of the 24-Pergunnahs, and requested that the necessary steps might be taken for acquiring the lands in question.

On the 5th, pursuant to the direction contained in Government letter of the 3rd of September, Mr. Carlyle, the Secretary to the Board, instructed Ganga Charan Chatterjee to make the necessary arrangements for starting the land acquisition proceedings at once, as the matter was very urgent.

This communication was in accordance with s. 7 of the Act. Under s. 8 Ganga Charan Chatterjee made on the 7th of September the following order:—"Issue general notice

at once. Surveyor will please measure land at once and submit measurement papers to this office."

On the same day under s. 9 of the Act a notice was issued on the plaintiff signed by the Collector. On the 23rd another notice under s. 10 was issued upon the plaintiff to make or deliver a statement as required under the Act.

A fresh special notice was also issued on the same date under s. 9, cl. 2 (exhibit M).

Ganga Charan Chatterjee commenced his proceedings as shown above on the 7th of September and concluded the same on the 23th of December. He made his award, as it is called in the Act, on the last mentioned date, fixing the value of the property, including the tenants' interest and the statutory allowance, at Rs. 2,63,313-4.

On the 8th of January he gave notice to the plaintiff under s. 12, sub-sec. 2 of the Act, tendering the amount to which the plaintiff was entitled, viz.,—Rs. 2,54,213-4.

On the 16th of January the plaintiff's solicitors notified to the Land Acquisition Collector that he would not accept the amount awarded.

We are passing over for the present certain correspondence which appears to have taken place about this time between the Land Acquisition Collector and the Bank's solicitors, as it will be dealt with under another branch of the case.

On the 22nd of January 1901 the case which had proceeded so far in the manner above described entered upon a new phase. Mr. Cohen, the plaintiff's agent, states that the plaintiff had spent a sleepless night thinking over this award, and that on the 22nd he obtained advice from a Counsel, whom he names, and then for the first time became aware of what he describes as his rights. Thereupon on the same day the plaintiff's solicitors wrote to the Land Acquisition Collector, informing him of the advice they had obtained that the Government were not authorised under the Land Acquisition Act, to acquire the premises in question for the Bank of Bengal, and that their client was prepared to take the necessary steps to prevent their proceeding further to do so, and asking him (*i.e.*, the Land Acquisition Collector) in the meanwhile not to take possession of the premises.

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On the 5th of February, however, the plaintiff applied for a reference to the Civil Court under the provisions of the Act and that reference is still pending.

On the 31st of February the Board, in view of the objections of the plaintiff's solicitors, directed the Deputy Collector to defer taking possession.

On the 19th of March the plaintiff's solicitors wrote to the Chief Secretary to the Government of Bengal, enquiring what Government was going to do, and threatening to file a suit, and on the 28th, Government replied telling them that proceedings would remain in abeyance for the present. On the 29th, Messrs. Gregory and Jones addressed a more peremptory letter to Government calling upon them to withdraw at once from the acquisition, otherwise a suit would be filed.

On the 3rd of May the Board of Revenue directed the Commissioner of the Division to resume the proceedings, and on the 17th of May Messrs. Gregory and Jones wrote to the Chief Secretary warning Government against taking any action and saying that "they were acting in concert with Morgan & Co."

On the 30th of May 1901 the Under-Secretary to the Government of Bengal informed the plaintiff's solicitors that Government intended to proceed with the land acquisition, and referred further communication on the plaintiff's behalf to the Board of Revenue.

This suit was filed on the 15th of May in the same year. The defendants are the Secretary of State, the Bank of Bengal, and Mohanundo Gupta, the present Land Acquisition Collector. He was added as defendant in place of Ganga Churn Chatterjee on the plaintiff's application and at his risk by an order made on the 20th of June 1901. The plaintiff obtained a further order on the 30th of June last for amendment by the insertion of certain matters, which are embodied in paras. 22 to 26 of the plaint. He alleges that the proceedings taken by the Government are from their inception not in compliance with the Act; that the Government has no power to acquire the premises for the Bank; that no enquiry was held or consent given in fact, as required under the Act; that he had no notice of any such enquiry, and that the enquiry is therefore bad and of no effect; that the agreement

entered into between the Bank and the Government is illusory for various reasons, which we shall discuss later on; that the declaration is not in accordance with the law, and that the words "for a public purpose" mentioned therein were inserted "fraudulently and falsely;" that the proceedings before the Land Acquisition Collector were illusory and in fraud of the Act; that he proceeded on the estimate sanctioned by the Government and did not form his judgment on the evidence before him; that as a judicial officer he was confined to the evidence given in Court; and generally he charges, if words have any meaning, that the proceedings taken by Government were collusive, fraudulent, and illusory. This in substance represents his allegations.

As we shall deal *seriatim* with his objections, it is not necessary to do more than indicate at present the nature of his contentions.

The principal defendants, the Secretary of State for India in Council and the Bank of Bengal, traverse *in toto* the allegations made in the plaint and the insinuations contained therein; they assert that all the proceedings taken by Government were in strict conformity with the provisions of the Act and the rules framed thereunder; and that there is absolutely no ground for charging fraud against either of the defendants; they deny that the plaintiff was entitled to any notice of the enquiry held by Mr. Carlyle, or that it is bad, because the plaintiff had no notice; they assert that the declaration is in conformity with the law, and they deny that the words "for a public purpose" were inserted "falsely or fraudulently;" they deny also that the proceedings before the Collector were illusory or a fraud upon, or an evasion of the Act. They further contend that this Court is not competent to enquire into or determine the questions raised by the plaintiff; that the proceedings under the Act taken by the Local Government, as well as before the Collector, were of a ministerial character and cannot be reviewed by the Civil Court. They further contend that the suit is not maintainable in the absence of a proper notice under s. 424 of the Civil Procedure Code and s. 52 of the Land Acquisition Act. When the case came on for trial certain issues were suggested by learned Counsel on both sides. We did not, however, accept their suggestions, but settled separate issues,

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which appear to us to cover all the questions raised in the case. The suggestions of the parties, however, have been allowed to remain on the record to indicate their respective contentions.

We propose to deal first with the objections of the defendants relating to the notices under s. 424 of the Code of Civil Procedure and s. 52 of Act I of 1894. It is contended by the learned Advocate-General that, although a notice of action had been given to the Secretary of State as provided for under the section of the Civil Procedure Code in respect of the allegations contained in the original plaint, the Secretary of State is entitled to a further notice with regard to the cause of action disclosed in the amendments made under the order of the 30th of June last; he contends that the amendments allege an entirely new cause of action, based upon an allegation of fraud; and he refers to the case of the *Secretary of State for India in Council v. Rajluchi Debi*(1) in support of his proposition that the provisions of s. 424 must be strictly complied with. S. 424 relates to the institution of a suit against the Secretary of State for India in Council. There is nothing in the law to show that in case of any amendment necessitated by the alleged discovery of facts previously unknown to the plaintiff, the Secretary of State should have a further notice of two months. Although the Appellate Court has laid down that the section should be literally construed and strictly applied in favour of the necessity for notice, we are not disposed to extend its operation beyond the actual words used. In the case before us the relief asked for is not altered by the amendments, which only embody certain further materials in support of the plaintiff's contention. It was also urged by the learned Advocate-General that notice not having been served on Mohanundo Gupta, the suit against him is bad and ought to be dismissed. He is not sued for any act done by him independently of the Government, and no separate relief is asked for against him. He is joined in the action in order that he may be restrained by an order of this Court from giving effect to the instructions received by him. Under these circumstances we do not think notice of action is required in his case.

(1) I. L. R. 25 Cal. 299.

With respect to the objection under s. 52 of the Land Acquisition Act, which applies chiefly to the Bank of Bengal, we are of opinion that the section in question refers to a tortious act done under the enactment. It is not alleged that save and except the proceedings taken there has been any act done in pursuance thereof. We think, therefore, that the objections in bar, so to speak, taken on behalf of the defendants must be overruled.

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We now come to the contentions of the plaintiff which appear to us to group themselves under four heads:—

- (1) As regards the sufficiency and legality of the proceedings under Part VII of the Act.
- (2) As to the legality of the proceedings taken before the Collector and the validity of the award made by him.
- (3) As regards the charge that the whole proceeding was collusive and illusory and a fraud upon the Act.
- (4) As regards the jurisdiction of the Land Acquisition Collector to deal at all with the matter.

The fourth objection may be disposed of in a few words.

It is suggested that as the premises in question are situated in Calcutta, the Collector sitting at Alipore had no jurisdiction to deal with the matter.

It appears to us that there is no substance or force in this contention.

The officer in question was posted to the sudder station of the 24-Pergunnahs, namely, Alipore. His office was located there. His jurisdiction under the Act extended over several districts, including Calcutta. He held his sittings at the office to which he was posted. No authority has been pointed out to us in support of the proposition that he could not hold his enquiry at this office with respect to property situated in any portion of the area over which he had been invested with the power of acquiring the land. Admittedly this is the first time that an objection of this kind has ever been put forward; and although that is no ground for holding that it has no force, it seems to us that it lies on the plaintiff to substantiate his objection by some authority.

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We have not been referred to any law or principle or precedent in support of the extraordinary proposition put forward on his behalf. We accordingly overrule this objection.

In order to determine the questions summarised under the first three heads, it is necessary to examine the provisions of the law. We may observe that previous to the enactment of Act I of 1894, the law in force was Act X of 1870. The present Act differs in material particulars from the former Act, although in its main features it proceeds upon the same lines. It is an Act authorising the Local Government to make compulsory acquisition of lands for public purposes and for companies, and for determining the amount of compensation to be made on account of such acquisition. In making the acquisition the wishes of the owner of the land are wholly irrelevant under the Act. It does not contain any provision for any objection on the part of the owner to the acquisition itself. All his objections are limited to the amount of compensation and matters connected therewith, such as measurement and area. In the case before us the acquisition purported to be made by the Local Government was for a company, namely, the Bank of Bengal. A Company is defined to mean a Company registered under the Indian Companies Act, 1882, or under the (English) Companies Acts, 1862 to 1890, or incorporated by an Act of Parliament or of the Governor-General in Council or by Royal Charter or Letters Patent. The Bank of Bengal admittedly is a Company within the meaning of the Act; and although it has been contended that, inasmuch as the Bank had the power under its own Act of 1876 to acquire land, the Local Government could not take steps under the Land Acquisition Act to acquire lands for the Bank, no authority has been cited to us nor has any provision of the law been referred to, to justify the contention that the Local Government could not in this instance take the action it has done. S. 6 provides that, whenever it appears to the Local Government that any particular land is needed for a public purpose, or for a Company, a declaration shall be made to that effect under the signature of a Secretary to such Government, or of some officer duly authorised to certify its orders. This provision is subjected to those of Part VII of the Act and to the proviso that no such declaration shall be made, unless the compensation to be

awarded for such property is to be paid by a Company or wholly or partly out of public revenues or some fund controlled or managed by local authority. It is unnecessary at present to refer to sub-ss. 2 and 3 of s. 6. Part VII, to which the provisions of s. 6 are subjected, deals with the acquisition of land for companies. S. 38 is immaterial for the purposes of this case, as the present proceedings were not taken under s. 4. S. 39 declares that the provisions of ss. 6 to 37, both inclusive, shall not be put in force in order to acquire land for any Company, unless with the previous consent of the Local Government, nor unless the Company shall have executed the agreement hereinafter mentioned. Under s. 39, therefore, the proceedings under ss. 6 to 37 cannot be put in force without the previous consent of the Local Government, nor unless the Company for which the land is going to be acquired shall have executed the agreement to which reference is made in s. 41. S. 40 declares that the consent provided for in s. 39 shall not be given, unless the Local Government be satisfied by an enquiry held as "hereinafter provided" (1) that such acquisition is needed for the construction of some work and (2) that such work is likely to prove useful to the public. Under sub-s. 2 the enquiry is to be held by such officer and at such time and place as the Local Government shall appoint. To the provisions of sub-s. 3 we shall refer presently. The enquiry which is required under sub-s. 2 is for the purpose of satisfying the Local Government. The application which is made to the Local Government is made by the Company on the allegation that the acquisition is needed for the construction of some work. The Company, therefore, has to satisfy the Local Government as to the reality and *bond fides* of the said allegation. It has also to satisfy the Government and the Government is to satisfy itself that the work which is proposed to be constructed is likely to prove useful to the public. The only parties concerned in this enquiry are the Government on one side, which has to be satisfied, and the Company, which has to furnish materials for the purpose of satisfying the Local Government. There is no provision in this section that any other person should be summoned or required to attend at the enquiry contemplated.

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It is contended, however, on behalf of the plaintiff that, as under sub-s. 3 the officer appointed for the purpose of holding the enquiry is authorised to summon and enforce the attendance of witnesses and to compel the production of documents by the same means and, as far as possible, in the same manner as is provided by the Code of Civil Procedure in the case of a Civil Court, it is evidently intended that the enquiry should be a judicial enquiry, and that all persons interested in the subject-matter of the enquiry should have an opportunity of attending and submitting their objections. In support of this contention an enormous number of cases have been cited, some of them being under the Land Clauses Consolidation Act, others relating to the right of a member of a club to be present at an enquiry held by the general body of the members with a view to his expulsion. There is no analogy between the latter class of cases and the question under discussion. There the "enquiry" is of a direct and personal character: under s. 40 the "enquiry" is of a special nature limited to a particular object.

As regards the cases decided under the English statutes, no useful purpose, in our opinion, is served by referring to them in construing Indian enactments; for, unless the English statute and the Act of the Indian Legislature are *in pari materia*, instead of affording any help, they only tend to confuse the consideration of the matters in issue. We do not therefore propose to burden our judgment with an examination of the mass of English cases cited at the bar, for in our opinion, the decision of the case before us must depend exclusively on the construction of Act I of 1894, which is *sui generis* in its character and which vests the Local Government with absolute discretion in the matter of acquisition, irrespective of any consideration of the willingness or unwillingness of the owner to part with his property. Nor do we think it necessary to examine the provisions of the earlier Acts in order to apprehend the meaning or to construe the law now in force.

An appeal has been made to the principles of natural justice that a person whose property is going to be taken should be allowed a hearing in the matter. When the provisions of the law are clear, it seems to us it is not competent to Courts of

Justice to enter into questions of "natural justice." If, however, it is open to us to express an opinion, we think that, having regard to the economic and social conditions of the country, the provision that the Government should be the sole judge of what is likely to prove useful to the public is both expedient and reasonable. It is easy to conceive the paralysis which may overtake the Administration, if we were to give effect to the present contention.

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There is no definition of "a public purpose" in the Act, nor any limitation regarding what is likely to prove useful to the public. For obvious reasons both matters are left to the absolute discretion of the Local Government; and it seems to us it is not competent to this Court to assume to itself the jurisdiction to impose restrictions on this discretion by holding that at an enquiry under s. 40, the person whose land is intended to be acquired should have an opportunity to appear and object—a course wholly contrary to the policy of the Act.

In our opinion s. 40 constitutes the Government, as the custodian of the public interests, the sole judge of the two facts mentioned therein, namely, whether the land is required for the construction of some work, and, secondly, whether that work is likely to prove useful to the public. The only other person concerned in the matter is the Company which makes the application for the land. The officer deputed to make the enquiry is to give that Company notice, and, if necessary, to take evidence from the Company regarding the questions on which he is to report. Sub-s. 3, in empowering the said officer to summon witnesses, etc., contemplates only the possibility of his having to take evidence on behalf of the party, who is principally concerned in that particular enquiry, namely, the Company. The time and place which are appointed are for the purpose of enabling the Company to produce its evidence or to place materials for the satisfaction of the officer. Nowhere in the Act is there any provision that the owner of the land should appear before the officer deputed under s. 40, or at all, until the service upon him of the notice under s. 9. Had the intention of the Legislature been that the owner of the property should be required to be present at the enquiry under s. 40, we have no doubt that it would have expressly

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provided for that purpose. In this case we find as a fact that an enquiry was held by an officer deputed for the purpose by the Board, at the instance of the Government. Some question was raised that, if the enquiry had been entrusted to anybody else, it would have been perhaps more satisfactory. We consider that wholly immaterial. The Act requires that the enquiry should be held by such officer as the Local Government shall appoint. It is clear, therefore, that the enquiry must be by some officer of the Government itself. In the second place, we find that in this case an officer was appointed by the authority to which the Local Government delegated its power of appointment. It is not open to us, as we apprehend the law, to discuss either his qualifications or the sufficiency of the enquiry held by him. In our opinion the Local Government is the sole judge of those matters. So long as it is satisfied upon the two matters which are made conditions precedent to its according its consent to the acquisition of the land, this Court in our judgment is not competent to question the validity of the proceeding under s. 40.

In this view we overrule the objection urged against Mr. Carlyle's enquiry. S. 41 provides that after the enquiry directed by s. 40 the officer in question shall report to the Local Government the result of such enquiry; and if the Local Government is satisfied that the proposed acquisition is needed for the construction of a work, and that such work is likely to prove useful to the public, it shall, subject to such rules as the Governor-General of India in Council may, from time to time, prescribe in this behalf, require the Company to enter into an agreement with the Secretary of State for India in Council providing, to the satisfaction of the Local Government, for the several matters which are set forth specifically in that section.

A report, as we have already seen, was submitted by Mr. Carlyle embodying the result of his enquiry. Upon that report the Local Government was in fact satisfied that the proposed acquisition was needed for the construction of the work, and that such work was likely to prove useful to the public. We find also that after being so satisfied, it called upon the Bank to enter into an agreement as required under s. 41.



It is contended on behalf of the plaintiff that the consent required under s. 39 should have been given after the agreement had been executed, and that such consent should have been notified by a resolution in the Gazette. We do not understand upon what data these contentions are based. There is no provision in the Act itself that the consent should be notified in the form or in the manner contended for by learned Counsel appearing for the plaintiff, nor do the provisions of the section indicate that the consent should be express and must be formulated in terms. What the section requires is that, upon being satisfied of the facts to which reference is made in s. 40, the Government should call upon the Company to enter into an agreement. That was done in the present case. As a matter of fact by letter No. 2826 the Government expressly gave its consent to the acquisition of the land and the application of the provisions of the Act.

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It is contended further that the agreement is illusory, (1) on the ground that there is no substantial provision regarding the user by the public under cl. 5 of s. 41; (2) because the arrangement by which the Bank of Bengal carries on the work of the Government is terminable at the end of ten years from 1898. Under the provisions of s. 42 the agreement entered into between the Secretary of State and the Bank was published in the local Gazette and the *Gazette of India*, and by virtue of the enactment it has become a part and parcel of the law. S. 41 makes the Government the sole judge of the manner in which the public are to have the use of the land taken up. The agreement provides that the public, subject to the Act constituting and the bye-laws regulating the Bank, shall be entitled to the said building or buildings in relation to the said Government business so far as the same may be utilized by the Bank for the purposes of such business. We are asked to hold that the latter part of cl. 5 renders the whole provision nugatory. We are not prepared to accept this view. In the first place, the Local Government, which is vested with absolute discretion in this matter and which is the sole custodian of the public interest in this country, made that provision in relation to the transaction of the Government business by the Bank in the proposed new buildings. The acquisition was needed

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for the purpose of constructing new buildings to afford better accommodation for the transaction of the public business. The rights of the public generally are dependent upon the Government business, and the Government has considered the conditions therein inserted as sufficiently safeguarding its interests. This Court, in our opinion, has no power to enter upon a consideration of the question how far that provision sufficiently safeguards the interests of the Government or of the public, of which it is the custodian.

As regards the second point, we think that it is equally untenable. When the lands are acquired under the provisions of the Land Acquisition Act, save and except under Part VI, they are acquired permanently, and the compensation which is paid to the owner is awarded on the basis of its absolute value. The Act nowhere says that, whether land is acquired for a public purpose or for a Company, it should be for a permanent public purpose or for a permanent Company. If the contention of the plaintiff is given effect to, it would render it impossible for the Government to acquire lands for any Company under any circumstance, because there is always the possibility of the Company being wound up. The question whether the contract between Government and the Bank of Bengal is terminable at the end of ten years is a matter with which, in our opinion, the plaintiff has no concern, for he obtains the absolute value of the property and is not concerned any further with any question relating to the permanency or otherwise of the purpose for which it is acquired.

It has also been urged on the plaintiff's behalf that the declaration issued by the Local Government was not in compliance with the Act.

If we have fully apprehended the argument on the point, the contention seems to be this: s. 6 provides that "whenever it appears to the Local Government that any particular land is needed for a public purpose or for a Company, a declaration should be made to that effect." The words "public purpose" and "Company" are used disjunctively, and if the land is required for a Company, it must be so stated without any reference to a public purpose. In the present case the declaration is in these terms:—

"Whereas it appears to the Lieutenant-Governor of Bengal that land is required to be taken by Government at the expense

of the Bank of Bengal for a public purpose, viz , for the extension of the Bank of Bengal's premises," it is therefore bad. In our opinion this argument proceeds upon a fallacy. The law requires that when any particular land is required for the two purposes for which the Local Government is authorized by the Legislature to put the Act into operation, a declaration to that effect should be previously made. It does not require that the intention of Government should be declared or notified in any particular form ; nor has it been pointed out to us that any form has been presented by the Act or the rules framed under the Act for such declarations. The use of the words "to that effect" indicate to our mind that it may be made in any form so long as the object is patent. In the present case it is clear that the purpose for which the land was needed was for the extension of the premises of the Bank of Bengal, a company within the meaning of the Act. There is no vagueness in the description or the object of the declaration.

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It may be that the use of the words "public purpose" was superfluous, but upon a careful consideration we are of opinion that there is no reason for holding that the declaration is not in compliance with the Act.

S. 6 further provides that "the said declaration shall be conclusive evidence that the land is needed for a public purpose or for a Company." Of course if the requirements of Part VII, to which the application of s. 6 and the subsequent section is subjected, are not complied with, the declaration will not have that effect. But in this case we have already found that the provisions of Part VII were complied with before the declaration was made and issued. It seems to us, therefore, that the plaintiff is not entitled to question the validity of the declaration, nor is it open to this Court to enter upon its determination.

There can be no doubt upon the materials on the record, that after the declaration the notices required under the Act were duly issued. The plaintiff appeared before the Land Acquisition Collector pursuant to such notices. His objections were enquired into and an award was made in the terms of s. 11. The plaintiff contends that the whole proceeding before the Collector was bad, and that the award is illusory, "a fraud upon and an evasion of the Act," and consequently of no effect. The grounds

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upon which this contention is based are of a somewhat peculiar character. First, it is said that the Land Acquisition Collector is a judicial officer, and, as such, he was bound to base his judgment as to the value of the property upon the evidence given before him in open Court in the presence of the parties; that he was not entitled to refer to the preliminary estimate prepared by P. C. Mitter or the statements and documents forwarded to him by the Bank's solicitor; that he acted improperly in making references to his superior officer and allowing himself to be practically guided by that officer in his decision, and that he, like the Government, was in concert or collusion with the Bank's solicitors. In support of this last allegation special reference is made to exhibit P, a letter from Gunga Churn Chatterjee, the Land Acquisition Collector, to the Bank of Bengal, in which, after informing them of the day fixed for the hearing of the Land Acquisition case, he states as follows: "As the compensation to be awarded is payable by the Bank of Bengal, I beg that you will, if you think fit, depute an agent of yours to watch the proceedings on behalf of the Bank and to contest any unreasonable claim that may be made on behalf of the parties interested." This, according to the plaintiff, shows the "illusory" character of the proceedings.

We may observe here that whilst Mr. Pugh, in answer to questions put by the Court, repudiated, in express terms, any charge of "personal" fraud against the Land Acquisition Collector or the other officers of Government concerned in the matter, the cross-examination of the defendant's witnesses by his learned junior conveyed distinct suggestions of collusion and bad faith on their part.

Under s. 50, sub-s. 2 the Company concerned is entitled to appear in any proceeding before a Collector or Court and to adduce evidence "for the purpose of determining the amount of compensation." The reason of this is obvious; for the Company has to pay the compensation. To give effect to this provision of the law, the Board of Revenue has framed a rule (p. 36, Rule 21), which is in these terms: "When he (the Collector) issues notices on the persons interested . . . he shall at the same time inform the Municipal body, Railway, or any other Company, who have under s. 50 (1) to defray the charges of the

Land Acquisition, of the day on which the enquiry under s. 11 is to be held, or to which it may be postponed, and to give such body or company an opportunity of contesting the claims of the claimants to compensation and of adducing evidence on their part as to the proper amount payable before he make his award."

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Babu Gunga Churn Chatterjee has stated in his evidence that it was under this rule that he gave the Bank the notice to which reference has just been made. It appears to us that in calling upon the Bank, if it thought fit, to depute a person "to contest any unreasonable claim," he acted in accordance with the law and the rule framed by the Board to give effect to the same, and that the suggestion of improper motive is wholly unfounded.

The next question we have to consider is whether, as the plaintiff contends, the Land Acquisition Collector is a judicial officer. He is a gazetted officer of Government appointed for the purpose of acquiring land for the State. It is in evidence that Land Acquisition proceedings are under the control and in the charge of the Board of Revenue as a department of Government. The Board has accordingly issued certain general rules (among them the one referred to above) for the guidance of the officers to whom the work of acquisition is, from time to time, entrusted. If those rules or instructions are in contravention of the express provisions of the law, they cannot make an act done by such officers valid. For example, if the rules were to say that no enquiry need be held under Part VII, or that the formalities prescribed should be ignored or treated as superfluous, any proceeding taken pursuant to that direction would be invalid. But where the rules are in furtherance of the provisions of the Act, in order to better enable the officers of Government to carry out the requirements of the law, it seems to us no question of *ultra vires* arises. It is admitted that if, in the case before us, the officer concerned acted in accordance with the rules prescribed by the Board, that would be evidence of his *bonâ fides*. On that narrow ground alone the Manual containing the rules tendered by the Advocate-General was admissible in evidence. It has been accordingly admitted and marked exhibit 10.

It must be noted that the Land Acquisition Collector cannot take any action under the Act, until he has received the directions

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of the Local Government or some officer authorized by the Local Government in that behalf (s. 7).

In this case Babu Gunga Churn Chatterjee received instructions from the Secretary to the Board of Revenue (Mr. Carlyle), to make necessary arrangements for starting proceedings for the acquisition of the land (exhibit I).

After receipt of the directions provided for in s. 7 the Collector has to have the land measured and a plan prepared (s. 8). He has then to issue notices to all persons interested to state the nature of their respective interests, and the amount and particulars of their claims to compensation in respect of such interest, and their objections to the measurement, if any [s. 9 (2)]. He is also authorized to require any person to make or deliver to him, at a time and place mentioned, the name of every other person possessing any interest in the land. Any person disobeying the requisition of the Collector makes himself liable under ss. 175 and 176 of the Indian Penal Code (s. 10). The Collector has then to enquire into the objections of the persons interested regarding the measurement and the value of the land, and also into the respective interests of the persons claiming the compensation, and then to make an award regarding the following particulars:—

First, the true area of the land; secondly, the compensation which in his opinion should be allowed for the land, and, thirdly, the apportionment of the said compensation among all other persons who are known or believed to be interested in the land of whom, or of whose claims, he has information whether or not they have respectively appeared before him (s. 11). The award so made has to be filed in the Collector's office, and he has to give immediate notice of the same to all the persons interested (s. 12). For the purpose of his enquiries the Collector is empowered to summon and enforce the attendance of witnesses, including the parties interested or any of them and to compel the production of documents by the same means (and so far as may be) as is provided in the case of a Civil Court under the Code of Civil Procedure (s. 14).

Although he has the power of summoning witnesses in the same manner as is provided in the case of a Civil Court, there is no

provision that any person making a false statement before him would make himself liable for giving false testimony. So far as we can see, the only liability is for disobedience of orders. Throughout the proceedings the Collector acts as the agent of Government for the purposes of acquisition, clothed with certain powers to require the attendance of persons to make statements relevant to the matters, which he has to enquire into. He is, in no sense of the term, a judicial officer, nor is the proceeding before him a judicial proceeding. In this view we are supported by the decision of this Court in *Durga Das Rukhit v. Queen-Empress*(1). The award which he makes does not possess any finality so far as the persons interested are concerned, for under s. 18 any person interested, who has not accepted the award, may, within a certain time, by written application to the Collector, require a reference of the matter for the determination of the Court. This shows that so far as the Collector is concerned, he is not a Court. In the present case the plaintiff has applied for and obtained a reference. The Government or the Company at whose instance the land is being taken up is not entitled to demand a reference (s. 50, *proviso*). The reason of this is plain. The Collector acts as the agent of the Government or of the Company for which the Government takes up the land, and they are accordingly bound by the award of their agent. But the Government, except in the special case provided for in s. 36, is at liberty to withdraw from the acquisition of any land, of which possession has not been taken (s. 48).

The circumstances under which the Government may withdraw are explained by the Board in their rule 19. This rule, after stating that too great care cannot be taken in making the examination, proceeds to say "the same course should be followed, if at any time before an award or reference to the Civil Court the Collector has reason to believe that the cost of acquisition will considerably exceed the estimate." Therefore until the reference to the Civil Court, it is open to the Local Government or the Company to withdraw from the acquisition, and the award has no binding effect. Should the Government persist in going on with the acquisition, the amount of the compensation

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fixed by the Collector is binding upon the Government, but not on the persons interested, for under no circumstance can the Civil Court award less than the amount fixed by the Collector. These considerations show to us that the award of the Collector is in no sense a judicial award. A great deal has been attempted to be made out of the fact that in the Act the term "award" has been used both in the case of the determination by the Collector as also by the Civil Court. Any inference from that circumstance appears to us to be fallacious. The meaning to be attached to the word "award" under s. 11 and its nature and effect must be arrived at not from the mere use of the same expression in both instances, but from the examination of the provisions of the law relating to the Collector's proceedings culminating in the award. The considerations to which we have referred satisfy us that the Collector acts in the matter of the enquiry and the valuation of the land only as an agent of the Government, and not as a judicial officer; and that consequently, although the Government or the Company at whose instance the Government is acquiring the land is bound by his proceedings, the persons interested are not concluded by his finding regarding the value of the land or the compensation to be awarded. His enquiry and his valuation are departmental in their character for the purpose of enabling the Government to make a tender through him to the persons interested. Such tender once made is binding on the Government, and the Government cannot require that the value fixed by its own officer acting on its behalf should be open to question at its own instance before the Civil Court.

But it is contended that, whether the Collector was a judicial officer or not and whether the proceeding before him was a judicial proceeding or not, he was not entitled to base his determination upon evidence other than that produced before him in the presence of parties. This argument again appears to us to beg the question. If the proceedings were judicial in their character, the Collector in arriving at his conclusion would, no doubt, be confined to such materials. But if he was acting as a mere departmental officer or an agent of the Government for the purpose of ascertaining the value of the property to enable a tender to be made, it would be open to him to consider all available



information on the point. Babu Gunga Churn Chatterjee has sworn that he took into consideration the sworn testimony and the exhibits placed before him, but "could not attach much importance to the evidence." If his determination or conclusion is wrong, it can be questioned before the Civil Court, "whose duty it is," as the learned Judges point out in the case of *Durga Das Rukhit v. Queen-Empress*(1), "to settle the matter in dispute judicially." But we feel bound to observe that, in view of the evidence in this Court, which clearly indicates that immediately on learning of the Bank's desire to acquire the land, the plaintiff's agent (Mr. Cohen) tried to run up the price, we are not prepared to hold that Gunga Churn Chatterjee acted improperly in discounting the materials on which the plaintiff's valuation was based. The entry of the 27th of August 1900 in the day-book of Messrs. Gregory and Jones (as appearing in their bill of costs, exhibits M. M. M.), and the statements of Mr. Cohen, coupled with his prevarications, leave no doubt in our mind that on being apprised of the Bank's necessity for increased accommodation, he set to work to show "the best result," as his attorney (Mr. Gregory) calls it. Mr. Gregory proceeded to add "by result I mean the best return for the support of my claim." Asked "before the Collector," he answered "yes, before the person appointed." The correctness of Gunga Churn Chatterjee's valuation is a matter for the consideration of the Court before which the reference is pending; the propriety of his conduct in discarding the plaintiff's evidence and forming his opinion on other materials, the only question on which we can express an opinion in this case is, in our judgment, under the circumstances mentioned, not open to any valid criticism. But his conduct is attacked not only on the ground indicated above, but on several others set forth more or less specifically in the plaint. It is urged that he had a sanctioned estimate before him, and that therefore his own "award" was "illusory;" that he was in communication with his Collector and acted in obedience to orders from the superior authorities. Similar suggestions are made on the basis of letters addressed to him by the Bank's solicitors or by him to them in the course of the proceedings, and it is contended that his "award" is a fraud upon and a colorable evasion of the Act. To our mind this contention

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is wholly groundless. As the determination of the officer is conclusive against the Local Government or the Company at whose instance the Act is put in force, the Board, which has charge of the Land Acquisition Department, has issued the general instructions to which reference has already been made. The rules in force in 1900 are contained in the Manual published under the Board's authority (exhibit 10). They contain minute directions regarding the mode in which the work is to be done by the Land Acquisition Collector, how the measurement should be made, estimates prepared and so forth. That the proceedings taken under the Act are subject to "the departmental rules" in respect to estimate, &c., appears from the rules framed by the Government of India under Act I of 1894 and notified by its Resolution No. 2209A, dated the 10th of May 1895 (Appendix XII of the Manual).

The Board's instructions require, in the first instance, a preliminary estimate (Rule 10). That estimate has to be sanctioned by the Government when issuing the declaration (Rule 15). As a safeguard against mistake or improper conduct on the part of the officer appointed to acquire the land, the rules provide that when the proceedings are conducted by an Assistant or Deputy Collector, if the intended award be within "the sanctioned estimate," he may (subject to certain exceptions) make the award without further reference. But if the intended award be beyond the amount of the sanctioned estimate, or if the amount of the compensation, which it is proposed to tender, exceeds in any one case Rs. 10,000, he must consult the Collector of the district demi-officially, and will make his final award according to the instructions received from that officer—in our opinion a most wholesome provision. In the present case the preliminary estimate was sanctioned by exhibit N. As the amount of compensation proposed to be tendered exceeded Rs. 10,000, the Deputy Collector, Gunga Churn Chatterjee, was bound under the rules to refer the matter to the Collector. In taking the sanctioned estimate into consideration and in communicating with the Collector, he acted in conformity with the general rules issued for the guidance of Land Acquisition Collectors. His determination was not a judicial act: he was acting merely as an agent of the Government to ascertain the

value and to make a tender. He was, therefore, not only competent, but bound to comply with the rules.

Reference has also been made to his letter (exhibit Y) dated the 14th of January 1901, addressed to Messrs. Morgan & Co., asking them, if the matter should go into Court, whether they would conduct the case or leave him to do so. If we have rightly apprehended learned Counsel, for the arguments on this branch of the case were not by any means clear, the suggestion is that this also shows collusion. Again, it seems to us there is some misconception. When a reference is made to the Civil Court, the claimant is to be regarded as the plaintiff and the Government as defendant. This is the invariable practice and the duty of the Collector in such cases is pointed out in clear terms in Rule 45, which provides that "when a reference to the Court has been made by the Collector under s. 18, on the ground of an objection to the measurement of the land or to the amount of the compensation \* \* \*, the Collector should defend the case exactly as he would a Government suit. The claimant in such cases is to be regarded as the plaintiff and the Government as defendant; and it is the duty of the Collector to see that evidence is forthcoming to show the fairness of the amount, which he has given as compensation. The Collector must remember that the Court will decide on the evidence before it what amount of compensation should be given, and he must, therefore, be prepared with reliable evidence at the trial." In the present case the Bank was to pay the compensation, and, in our opinion, it was only right and proper that Gunga Churn Chatterjee should consult its solicitors, whether they would defend the action or leave it to him.

It is not necessary in our judgment to dwell on the suggestion of collusion based on the correspondence between Messrs. Morgan & Co. and the Government Solicitor about a copy of a draft declaration, for we hardly think it could have been seriously advanced. Under Rule 10 the Bank had to supply the particulars to be embodied in the declaration, and its solicitors naturally applied to the Government Solicitor for a form.

We have been asked to treat the settlement of Messrs. Sanderson & Co.'s claim at a higher figure than the amount allowed by

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the Land Acquisition Collector as one of the indications of the illusory character of his award. With regard to this, we have only to observe that it was open to the Bank to settle the claim for any amount it liked, but it does not show that the Collector's award was erroneous—much less “illusory.” If it is an element for consideration in determining the compensation, the Court dealing with the reference will give it such weight as it deserves.

Great reliance has been placed on the case of *Maharaja Luckmeswar Singh v. The Chairman of the Darbhanga Municipality* (1). The facts of that case, in our opinion, have not the remotest analogy to those of the one before us, as will be seen from the following summary. The Collector of Darbhanga wanted a piece of land for the use of the Municipality. At that time the owner was a minor under the Court of Wards, and he remained a minor for several years after. The Court of Wards for the district of Darbhanga was the Commissioner of Patna acting under the Board of Revenue, and the representative of the Commissioner in Darbhanga was the Collector for the time being of Darbhanga, who was also *ex-officio* Chairman of the Darbhanga Municipality. The Collector asked the Manager appointed by the Court of Wards of the minor's estate to consent to the sale of the land. The Manager replied that he had no objection to present the land in question to the town, but doubted his power to do so, and requested the matter be submitted to the Court of Wards for orders. The Collector thereupon appears to have written to the Commissioner, who represented the Court of Wards. In his reply this officer, acknowledging the Collector's letter “regarding the land belonging to the Darbhanga Raj made over to the Municipality free of cost for the construction of a bathing ghat,” said as follows :—

“As regards the procedure to be observed in the case, you should offer the Manager one rupee compensation and allow the Manager to refer the point to the Board of Revenue with whose sanction the award can undoubtedly be accepted, and acceptance of the award will act as a valid conveyance :—”

The Collector thereupon offered the Manager one rupee as compensation for the land in question. The Manager asked

(1) (1889) L. R., 17 IA. 90.

the sanction of the Court of Wards to accept the offer. Ultimately the Board of Revenue as the Court of Wards gave its sanction, and the Manager accepted the rupee paid by the Collector and gave a receipt for it, describing it as a nominal compensation for the Raj land taken up by the Municipality. After attaining majority the Maharajah brought a suit to recover possession of the land. The first Court made a decree in his favour, which was reversed by the High Court. On appeal to the Privy Council their Lordships, with reference to the Commissioner's letter, said as follows :—"Their Lordships feel compelled to state their opinion that the direction or suggestion to offer one rupee compensation was a colorable way of doing indirectly what it was seen could not be done directly, *viz.*, the guardian making a present to the town of the land of his ward." Dealing with the duties of the Collector under the Land Acquisition Act, they point out that one of the matters he was to consider was the market value at the time of awarding compensation of the land, and they observe that "it is obvious that the offer of one rupee was not in accordance with the duty of the Collector under these sections, and it would be altogether wrong to treat one rupee as the amount of compensation determined under s. 13" (of the old Act). And they go on to say "although the Court of Wards had no power to alienate the land for the purpose for which it was required possession might have been lawfully taken of it, if the provisions of the Land Acquisition Act had been complied with. But they were not. The Collector made no enquiry into the value of the land. He was the Chairman of the Municipality, and his sole object appears to have been to benefit the town, forgetting that, as the representative of the Court of Wards, it was his duty to protect the interests of the minor and to see that the provisions of the Act were complied with." And further on their Lordships add : The offer and acceptance of one rupee was a colourable attempt to obtain a title under the Land Acquisition Act without paying for the land, and their Lordships have felt some surprise at the direction which originated it having come from the Commissioner." And they pointed out that there was no reference, as the High Court thought, of the minor's claim to the Civil Court under the Act.

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The suggestion that there is any analogy between that case and the present is, in our opinion, of no force, for, as we have already stated, we consider that the enquiry by the Collector in this case was conducted and the award made in accordance with the Act, and was therefore not an evasion of the law.

For the foregoing reasons we are of opinion that neither the enquiry held by Mr. Carlyle nor the proceedings before the Land Acquisition Collector are invalid as contended for by the plaintiff and that this suit should be dismissed.

A large mass of correspondence has been put in on behalf of the plaintiff which took place between the solicitors on the two sides after the institution of the suit. These letters are relevant only to the question of costs. The plaintiff's attorneys called upon the solicitors for the defendants to admit the documents disclosed in their affidavit, in order to prepare a brief for the use of Court. The latter expressed their inability to comply with the request. We cannot help thinking the defendant's attorneys are to blame in not endeavouring to meet the request of the plaintiff's attorneys even partially. They could easily have obtained advice on the relevancy of the documents. As it was, the best part of a day was lost in wrangling over them. Had the matter rested there, we should have certainly disallowed the defendants at least one day's costs. But so much time has been occupied on behalf of the plaintiff in repeated attempts to introduce irrelevant documents on the record and in irrelevant cross-examination that we think we should not depart in this case from the usual rule, viz., that costs should follow the result.

The suit is accordingly dismissed with costs.

Solicitors for plaintiff: *Gregory and Jones.*

Solicitors for defendant, the Secretary of State for India: *Sanderson & Co.*

Solicitors for defendant, the Bank of Bengal: *Morgan & Co.*

R. G. M.

CRIMINAL REVISION.

BAIDYA NATH MAJUMDAR

v.

NIBARAN CHUNDER GOPE.*

1902
Feb. 25.

Security for keeping the peace on conviction, order for—Offences not within the terms of s. 106 of the Code of Criminal Procedure (Act V of 1898)—Duty of Magistrate to record findings of fact, which make that section applicable.

Where the offences of which a person is convicted do not in themselves, and apart from any other incidents, come within the terms of s. 106 of the Criminal Procedure Code, it is incumbent upon the Magistrate to record a clear finding with respect to the facts which in his opinion make the provisions of that section applicable.

Jib Lal Gir v. Jogmohan Gir(1) followed.

THE Petitioners Baidya Nath Majumdar and another obtained a Rule calling on the District Magistrate to show cause why the order passed under s. 106 of the Code of Criminal Procedure should not be set aside, on the ground that the offences of which the petitioners had been convicted did not fall within the terms of that section.

In this case the Petitioners were convicted on the 6th August 1901 by the Deputy Magistrate of Burdwan under ss. 447 and 426 of the Penal Code of having entered upon and ploughed certain land belonging to the complainant in which seedlings were at the time growing, and of having destroyed some of the seedlings. One of the petitioners had purchased the land, and the ploughing was done by way of asserting his claim to title and possession.

The Petitioners were also bound down to keep the peace, the Magistrate stating as follows in his judgment:—

“The accused used twelve ploughs. Wherefore it is evident to show that they were ready to commit breach of the peace when opposed by the other party. They were therefore liable also under s. 106 of the Code of Criminal Procedure.”

Babu Haro Prasad Chatterjee for the petitioners.

* Criminal Revision No. 102 of 1901, against the order passed by S. C. Das, Esquire, Deputy Magistrate of Burdwan, dated the 6th of August 1901.

(1) (1869) L. L. R. 26 Calc. 576.

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 GOPE.

STEVENS AND HARRINGTON JJ. The petitioners were convicted under ss. 447 and 426 of the Indian Penal Code, the case being that they entered upon certain land of the complainant, in which seedlings were at the time growing and ploughed that land, and destroyed some of the seedlings.

It appears that one of the petitioners had purchased the land, and that the act was done by way of asserting his claim to title and possession. The case was tried summarily, and at the end of the judgment appears the following :—

“The accused used twelve ploughs. Wherefore it is evident to show that they were ready to commit breach of the peace when opposed by the other party. They were therefore liable also under s. 106 of the Code of Criminal Procedure.”

The Deputy Magistrate acting, as he considered, in accordance with the provisions of that section bound the petitioners down to keep the peace.

The present Rule was issued to show cause why the order passed under s. 106 of the Code of Criminal Procedure should not be set aside, on the ground that the offences of which the petitioners have been convicted do not fall within the terms of that section. The Deputy Magistrate has submitted an explanation, in the course of which he states that the evidence of the witnesses brought to light that the accused had also *lathials*. Nothing is said in the judgment about any *lathials*; but an inference as to the intention to commit a breach of the peace is drawn merely from the number of ploughs said to have been used by the petitioners.

We think that, inasmuch as the offences of which the petitioners were convicted do not in themselves, and apart from any other incidents, come within the terms of s. 106, it was incumbent upon the Deputy Magistrate to record a clear finding with respect to the facts which in his opinion made the provisions of that section applicable. We are supported in this view by the case of *Jib Lal Gir v. Jogmohan Gir*. (1)

We think that on the record, as it stands, the order made under s. 106 is bad. We therefore make the rule absolute, and set that order aside.

D.S.

Rule made absolute.

(1) (1839) I. L. R. 26 Calc. 576.

BAISTAB CHARAN SHAHA

v.

EMPEROR.*

1902

Feb. 27: . .

Wrongful confinement—Prisoner in Jail—Confinement, illegal in cell—Penal Code (Act XLV of 1860), ss. 79, 114, and 342.

If a prisoner is confined in a particular part of a prison without legal authority, that confinement is a wrongful one, notwithstanding that his confinement in the prison at large may be legal.

IN this case a prisoner in the Monghyr Jail was suffering from dysentery. The Civil Surgeon ordered the petitioner Baistab Charan Shaha, the Civil Hospital Assistant, to give him some enemas. The prisoner objected on one occasion and was, under the orders of the petitioner, locked up in a cell. The prisoner while in the cell attempted to commit suicide.

The petitioner was convicted on the 6th June 1901 by the Deputy Magistrate of Monghyr under s. 342 read with s. 114 of the Indian Penal Code, and sentenced to undergo simple imprisonment for seven days and ordered to pay a fine of Rs. 50. The Sessions Judge on appeal affirmed the conviction, but altered the sentence to one of fine of Rs. 120.

Babu Hari Bhusan Mukerji for the petitioner.

STEVENS AND HARRINGTON JJ. In this case a Rule was granted calling upon the District Magistrate to show cause why the conviction of and the sentence passed upon the petitioner should not be set aside on the ground that the facts found do not amount to an offence.

The petitioner has been convicted under ss. 342 and 114 of the Indian Penal Code, and has been sentenced by the Magistrate, who tried him, to suffer simple imprisonment for one week and to pay a fine of rupees fifty, or one month's simple imprisonment in default. On appeal the Judge of the lower Appellate Court affirmed the conviction, but altered the sentence to one of fine of 120 rupees.

* Criminal Revision No. 1029 of 1901, against the order passed by W. H. Vincent, Esquire, Sessions Judge of Bhagulpore, dated the 5th of July 1901.

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v.
EMPEROR.

A perusal of the judgment of the lower Court shows that it was established that a man named Ram Sahay Dhanee was suffering from dysentery in the Jail; that the Civil Surgeon ordered an enema to be given to him; that the accused administered some enemas to him; that on his refusal to submit to having another enema administered to him he was ordered by the accused to be put into a cell; and that in pursuance of that order Ram Sahay Dhanee was put into a cell and locked up. These findings establish that there was a confinement. We do not agree with the argument which has been addressed to us that there cannot be an imprisonment within an imprisonment. It seems to us clear that, if a prisoner is confined in a particular part of a prison without legal authority, that confinement is a wrongful one, notwithstanding that his confinement in the prison at large may be legal. There is nothing in the judgment of the lower Court from which we can infer that there was any legal warrant for the confinement of Ram Sahay Dhanee in the cell in which the accused ordered him to be confined; and the learned vakil who has appeared for the appellant has not been able to draw our attention to any provisions of law under which such confinement can be justified. But he contends that the act of confining Ram Sahay Dhanee in the cell in question was done by a person, who, under a mistake of facts, believed himself justified in so confining him, and therefore under s. 79 the act is not an offence. There is nothing in the facts disclosed in the judgment to warrant us in saying that there was any mistake of fact which led the appellant to suppose himself justified in law in confining this man; and the Magistrate points out that the appellant made certain inconsistent statements as to what had taken place, which, in our opinion, render it impossible to suppose that the appellant in good faith believed himself justified in law in acting as he did.

On these grounds, we think that this conviction must be sustained.

The Rule is therefore discharged.

D.S.

Rule discharged.

BIRBAL KHALIFA

v.

EMPEROR.*

Assault to deter public servant from discharge of his duty—Right of private defence—Rule in Police Code, effect of—Penal Code (Act XLV of 1860) ss. 99, 351 and 353.

1902
Feb. 20.

A rule in the Police Code to the effect that when any *surveillé* is at home, proof of his presence can be secured by taking a thumb impression on the report, does not impose any obligation on the *surveillé* to give the thumb impression and he cannot be forced to do so.

Before an act can amount to an assault under s. 351 of the Penal Code it is necessary that a gesture or preparation should be made by a person which would cause another to apprehend that the person was about to use criminal force to him then and there. A preparation taken with words which would cause him to apprehend that criminal force would be used to him, if he persisted in a particular course of conduct, does not amount to an assault.

Where a *surveillé* on a domiciliary visit being paid to him by a police officer, refused to allow his thumb impression to be taken, and, on the officer attempting to take it, produced a *lathi* saying he would not allow the impression to be taken and, if any one asked for it, he would break his head,

Held, that the act of the *surveillé* did not amount to an assault and that his conviction under s. 353 of the Penal Code should be set aside.

Held, further that, if his act had in itself amounted to an offence s. 99 of the Penal Code would apply.

THE petitioner Birbal Khalifa was a C class bad character on the Police Register. On the night of the 10th July 1901 the Sub-Inspector of Behipur thana paid a domiciliary visit to the petitioner in order to ascertain if he was at home. He called to the petitioner, who came out, whereupon the Sub-Inspector wished to take an impression of his thumb. The petitioner objected to this, and upon the Sub-Inspector extending his hand to take the impression, the petitioner went into his house and brought out a *lathi*, saying he would not allow the impression to be taken and he would break the head of any one who asked for it.

* Criminal Revision, No. 980 of 1901, against the order of W. H. Vincent, Esq., Sessions Judge of Bhagalpur, dated the 29th October 1901.

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 EMPEROR.

The petitioner was convicted under s. 353 of the Penal Code of assaulting a public servant in the execution of his duty and sentenced to rigorous imprisonment for six weeks. He appealed and his appeal was dismissed by the Sessions Judge of Bhagalpur on the 29th of October 1901.

Mr. Swinhoe (Rabul Dasarathi Sanyal and Babu Chunder Dutt with him) for the petitioner. Upon the facts found by the Sessions Judge the conviction under s. 353 of the Penal Code cannot stand. The action of the accused did not amount to an assault. The Sub-Inspector had no right to attempt to take the thumb impression by force after the accused had refused it; the latter was also justified in refusing to give it, his threat to assault anyone who would ask for the impression did not amount to an assault, as there was no intention on the part of the accused to use criminal force at the time he spoke, but only in case a further attempt was made to compel him to give it.

Babu Srish Chunder Chowdhry for the Crown. The accused has been rightly convicted. The Inspector was acting in accordance with the direction contained in rule 42 (h) of the Police Code which says that when a *surveillé* is at home proof of his presence can be secured by taking a thumb impression on the report. The Inspector was justified in trying to get the impression, and the accused had no right to refuse it. Even if he were not acting quite legally, s. 99 of the Penal Code would apply and the accused would have no right of private defence, as the Inspector was a public servant acting in good faith under colour of his office. The action of the accused in threatening the Inspector with a *lathi* was clearly an assault within s. 351 of the Penal Code.

Mr. Swinhoe in reply. There was no threat to commit violence on the spot, but only if the Inspector persisted in doing what he had no right to do. There is nothing to show under what authority the rules in the Police Code were made; they are apparently for the guidance of the police and are not binding on any one. Under rule 42 (h) the Inspector could no doubt take the impression, provided the accused was willing to give it, but not otherwise. My client is in no way affected by s. 99; he has

committed no offence, so that the question of the right of private defence does not arise.

STEVENS AND HARRINGTON JJ. The applicant in this case is registered as a bad character in the Police Register.

The case for the prosecution is that the Sub-Inspector paid a domiciliary visit to the petitioner in order to ascertain that he was at home and wished to take an impression of his thumb. The petitioner objected. The Sub-Inspector as he says "extended his hand" to take the impression. The petitioner went into his house and brought out a *lathi* and said that he would not allow the impression to be taken and that, if any one asked for it, he would break his head. On these facts the petitioner has been convicted under section 353 of the Indian Penal Code of assaulting a public servant in the execution of his duty as such public servant and has been sentenced to be rigorously imprisoned for six weeks.

The Sessions Judge upheld the conviction on appeal. Though he expressed some doubt as to whether the Police were justified in forcing a supposed bad character to give a thumb impression, he held that the act of the petitioner in getting the *lathi* and threatening the Sub-Inspector was not justifiable.

The Government pleader has appeared in support of the conviction and has referred us to a rule in the Police Code to the effect that when any *surveillé* is at home, proof of his presence can be secured by taking a thumb impression on the report. This, we take it, does not impose any obligation upon the *surveillé* to give the thumb impression and we do not see how he can be forced to do so, if he objects.

We have further been referred to the first clause of s. 99 of the Indian Penal Code, which provides that "there is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law."

The difficulty that we feel as to the application of this section is that we are not satisfied that the act of the petitioner amounted to an assault as that term is defined in section 351 of the Indian

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Penal Code. It is not said that the petitioner made any gesture or any preparation which would cause the Sub-Inspector to apprehend that the petitioner was about to use criminal force to him then and there. All that could be said is that his preparation taken with his words would cause the Sub-Inspector to apprehend that criminal force would be used to him, if he, the Sub-Inspector, persisted in a particular course of conduct. No doubt if the act done by the petitioner had in itself amounted to an offence, there would have been no question that section 99 would have applied.

In this view of the case we must make the rule absolute, set aside the conviction and sentence, and direct that the petitioner be released from bail.

D. S.

Rule made absolute.

ABDUL WAHED

v.

AMIRAN BIBI.*

1902

March 4.

Order for security for keeping the peace on conviction—Appeal—Appellate Court, power of, to set aside such order—Criminal Procedure Code (Act V of 1898) ss. 106 and 423, cl. (d).

An order in appeal setting aside an order of the first Court made under s. 106 of the Code of Criminal Procedure is an incidental order within the meaning of s. 423, cl. (d) of the Code and can be made by an Appellate Court.

THE petitioners, Abdul Wahed and others, obtained a Rule calling on the District Magistrate to show cause why the order under s. 106 of the Code of Criminal Procedure binding the petitioners down to keep the peace which was part of the case in appeal before the Sessions Judge as a Court of Appeal should not be considered by such Court.

The petitioners were convicted and sentenced on the 18th September 1901 by the Deputy Magistrate of Midnapur under s. 147 of the Penal Code, and were all bound down in the sum of Rs. 100 each, to keep the peace for one year under s. 106 of the Code of Criminal Procedure. On appeal, the Sessions Judge of Midnapur on the 30th September 1901 upheld the conviction and with regard to the order under s. 106 he stated as follows in his judgment :—

“As regards the order to furnish security to keep the peace, I doubt the advisability of it in this case, but this Court cannot interfere with it on appeal. The conviction being upheld, it remains.”

Mr. S. Roy (*M. Zahidur Rahim Zahid* with him) for the petitioners. Under s. 106, sub-section (3) of the Code of Criminal Procedure, an order binding down persons to keep the peace can be made by an Appellate Court. It would be anomalous, if the Sessions Judge, acting as an Appellate Court, could make such an order and yet have no power to set it aside when made by a Subordinate Court, while, on the other hand, the District Magistrate on appeal can make a similar order and has power under

* Criminal Revision No. 1058 of 1901.

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s. 125 of the Code to cancel the bond, when made by a Subordinate Court.

The defect however, if any, is remedied by clause (d) of s. 423 of the Code, which was added by Act V of 1898, which I submit is wide enough in its terms to enable the Judge to deal with questions arising on appeal under s. 106.

**STEVENS AND HARRINGTON JJ.** The learned Sessions Judge in upholding the conviction under s. 147 of the Indian Penal Code in the case expressed the opinion that the order which had been passed by the first Court requiring security to keep the peace under the provisions of s. 106 of the Code of Criminal Procedure, was one, to use his own expression, of which he doubted the advisability ; but he held that he could not interfere with it on appeal.

This Rule was granted to show cause why the order under section 106 should not be considered by the Sessions Judge, inasmuch as it was a part of the case in appeal before that officer.

Sub-section 3 of s. 106 provides that an order under the section may be made by an Appellate Court, and it would, we think, be very strange if the Legislature empowered an Appellate Court to pass such an order for the first time in appeal, and yet did not empower it to set aside an order of the same kind in appeal after it had been passed by the Court of first instance. It seems to us that a case of this kind is within the scope of clause (d) of s. 423 of the Code of Criminal Procedure, which provides that an Appellate Court may make any amendment, or any consequential or incidental order, that may be just and proper. We think that an order in appeal, setting aside an order of the first Court made under section 106, is an incidental order within the meaning of s. 423.

We therefore make the rule absolute, and we remit the case to the Appellate Court to consider the order under s. 106 of the Code of Criminal Procedure.

D. S.



## CIVIL RULE.

SINGER MANUFACTURING CO.

v.

BAIJNATH.\*

1902

July 3, 4.

*Foreign Corporation, suit by—Foreign Company not registered under the Indian Companies Act of 1882—Plaint, verification of by the Manager of an unregistered Company—Civil Procedure Code (Act XIV of 1882) ss. 430, 435—Indian Companies Act (VI of 1882) ss. 6, 41, 224.*

A foreign Corporation is entitled to sue in its corporate character in this country, without being registered under the Indian Companies Act of 1882, or an Act of Parliament; and a plaint in such a suit can be verified on behalf of the Corporation by one of its principal officers, under s 435 of the Code of Civil Procedure.

A Corporation duly created according to the law of one State may sue and be sued in its corporate name in the Courts of other States.

*Campbell v. Jackson*(1), and *Yusuf Beg v. The Board of Foreign Missions of the Presbyterian Church of New York* (2), distinguished.

THE petitioners, The Singer Manufacturing Company—duly incorporated by an Act of the Senate and General Assembly of the State of New Jersey in the United States, America, and approved by the Governor of the said State, for the purpose of manufacturing and selling sewing machines and of carrying on business incident thereto, in the said State or elsewhere,—who carried on the business of selling their machines in various parts of British India, instituted two suits in the Court of Small Causes, Cuttack, against the defendants Baijnath and another, cloth-merchants of Cuttack, through M. Krishna Murti, the Company's Manager in Orissa, for the recovery of the balance of the price of certain sewing machines sold, on their hire-purchase system, to the defendants.

The plaints were verified by the Manager of the Company, which was not registered under the Companies Act in India.

\* Civil Rules Nos. 1053 and 1054 of 1902.

(1) (1885) I. L. R. 12 Calc. 41.

(2) (1894) I. L. R. 16 All. 420.

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The defendants pleaded, *inter alia*, that there was no proper description of the plaintiffs, and that the plaints were not signed and verified according to law.

The Subordinate Judge of Cuttack, exercising the powers of a Court of Small Causes, rejected the plaints observing as follows:—

“These suits have been brought by a Company admittedly not registered by a British Sovereign or by any Indian Act. The plaints were not signed by anybody, but bear the initials (M. K. M.) which were said to be the initials of the Manager. It was verified by the Manager. As the Company was not registered under the Indian Companies Act or by an Act of Parliament, the Manager could not either sign or initial the plaints [see *Campbell v. Jackson* (1)]. These plaints are therefore bad in law.”

Thereupon the petitioners moved the High Court, and obtained these Rules calling upon the defendants to show cause why the order of the Subordinate Judge rejecting the plaints should not be set aside, and why the Subordinate Judge should not be directed to hear and determine the suits on the merits.

*Mr. Dunne* and *Babu Lalit Mohun Mullick* for the petitioners.

*Babu Mon Mohan Dutt* showed cause.

**BAHARJEH AND PRATT JJ.** These are two Rules calling upon the opposite party to show cause why the order of the Subordinate Judge rejecting the plaints in these two suits should not be set aside, and the Subordinate Judge should not be directed to hear and determine the suits on the merits.

The learned Subordinate Judge rejected the plaints in these two suits, because they were suits brought by a foreign Corporation (the petitioners before us) which was not registered under the Indian Companies Act (VI of 1882), and the plaints therefore could not, in the opinion of the Subordinate Judge, be verified on behalf of the Corporation by one of its principal officers under s. 435 of the Code of Civil Procedure. In support of the view he has taken, the learned Subordinate Judge refers to the case of *Campbell v. Jackson* (1).

(1) (1885) I. L. R. 12 Calc. 41.

The learned Counsel for the petitioners contends that this view of the Court below is wholly erroneous, that a foreign Corporation is entitled to sue in its corporate character in this country without being registered under the Indian Companies Act; that section 435 of the Code of Civil Procedure applies to such suits, and that the case of *Campbell v. Jackson*(1) does not lay down any rule such as the Court below thinks it does.

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On the other hand, the learned vakil for the opposite party, in showing cause, contends that, although a foreign Corporation may maintain a suit in this country, yet before it can claim the benefit of section 435 of the Code of Civil Procedure, it must be registered under the Indian Companies Act, and in support of his contention he refers to sections 4, 41, and 224 of Act VI of 1882 and to the case of *Yusuf Beg v. The Board of Foreign Missions of the Presbyterian Church of New York* (2), besides the case of *Campbell v. Jackson*(1) relied upon by the Court below.

We are of opinion that the contention on behalf of the petitioners is correct, and that the Court below was wrong in holding that the plaintiff Corporation was bound to be registered under the Indian Companies Act, or under an Act of Parliament before the benefit of section 435 of the Code of Civil Procedure could be claimed.

It is an established rule of private international law that a Corporation duly created according to the law of one State may sue and be sued in its corporate name in the Courts of other States: See Lindley on Companies, 5th edition, p. 909, and Story's Conflict of Laws, paragraph 565. Our Code of Civil Procedure, section 430, also expressly enacts that alien friends may sue in the Courts of British India, as if they were subjects of our Sovereign. Section 435 of the Code says that "in suits by a Corporation or by a Company authorized to sue and be sued in the name of an officer or by a trustee the plaint may be subscribed and verified on behalf of the Corporation or Company by any director or other principal officer of the Corporation or Company, who is able to depose to the facts of the case." There is nothing in this section to exclude from its operation a foreign Corporation or a foreign Company, and there

(1) (1885) I. L. R. 12 Calc. 41.

(2) (1894) I. L. R. 16 All. 420.

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is nothing in the Code of Civil Procedure or in the Indian Companies Act requiring such Corporation or Company to be registered under the Indian Companies Act before it can claim the benefit of section 435. The sections of the Indian Companies Act VI of 1882 to which reference has been made in the course of the argument by the learned vakil for the opposite party do not bear out his contention.

As for the two cases relied upon, on behalf of the opposite party, it is enough to say that the question now before us did not arise in either of them. It is true in the case of *Campbell v. Jackson*(1), Mr. Justice Field, in delivering the judgment of the Court, says, after referring to section 435,—“Now there is no suggestion in this case that this Company is a Company authorized to sue or be sued in the name of an officer or trustee. Such authority can only be conferred by Act of Parliament or by an Act of the Indian Legislature.” But these words must be taken in connection with the facts of the case. The facts of the case go to show that the Company there being a Company in British India, the only authority from which it could derive its powers would be an Act of the Indian Legislature or of Parliament. And with reference to *Yusuf Beg v. The Board of Foreign Missions of the Presbyterian Church of New York*(2), upon which reliance was placed, it appears from the judgment that it was not shown that the party claiming the benefit of section 435 was a duly constituted Corporation at all.

That being so, we think the view taken by the Court below is erroneous, and its order rejecting the plaints must be set aside, and the Court below must be directed to entertain the plaints and to deal with the cases according to law.

The Rules are made absolute with costs.

*Rules made absolute.*

R. D. B.

(1) (1885) I. L. R. 12 Calc. 41.

(2) (1894) I. L. R. 16 All. 420.

## CRIMINAL REVISION.

SHAMSUDDIN SIRKAR

v.

EMPEROR.\*

1902

May 21.

*Bail-bond—Guarantee by surety for appearance of accused before a certain Magistrate—Non-appearance of accused before different Magistrate—Bond, forfeiture of—Criminal Procedure Code (Act V of 1898) s. 514.*

Where a surety executed a bail-bond guaranteeing that the person, for whom he stood surety, would appear at the Court of a Deputy Magistrate before whom the case was pending, and the accused failed to appear before the District Magistrate, to whose file the case had been transferred.

*Held*, that there had been no breach of the conditions of the bail-bond, and that the order forfeiting it under s. 514 of the Criminal Procedure Code should be set aside.

THE petitioners, Shamsuddin Sirkar and others, obtained a Rule calling upon the District Magistrate to show cause why the proceedings taken under s. 514 of the Code of Criminal Procedure forfeiting the bond of the surety for the appearance of the person, against whom proceedings had been taken under s. 110 of the Code of Criminal Procedure, should not be set aside on the ground that it was not within the terms of his bond to produce the principal in the Court of the District Magistrate.

One Sahebulla was accused of bad livelihood. He appeared before a Deputy Magistrate on the 2nd December 1901. The case was then fixed for the 9th December and the accused was released on bail, the petitioner executing a bail-bond, whereby he guaranteed that the accused should attend at the Court of the Deputy Magistrate, Babu Kherode Chunder Sen, on every day on which the preliminary inquiry into the charge against him was being made. On the 7th December the case was transferred from the file of the Deputy Magistrate to the file of the District Magistrate. The accused appeared before the District Magistrate on the

\* Criminal Revision No. 137 of 1902, against the order passed by Ramendra Krishna, Esquire, District Magistrate of Bogra, dated the 13th December 1901.

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 " .  
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9th December, but absconded on the 12th, whereupon the petitioner was called upon to show cause why he should not forfeit his bail-bond, and on the 13th December an order was made under s. 514 of the Code by the District Magistrate of Bogra forfeiting the bond executed by the petitioner and directing him to pay the penalty of Rs. 100.

*Babu Sarat Chunder Roy Chowdhry* for the petitioner. The forfeiture or non-forfeiture depends on the terms of the bond. The Magistrate had no right to forfeit the bond, as there had been no breach of its conditions. The petitioner guaranteed to produce the accused during the inquiry before the Court of the Deputy Magistrate, and before no other Court. The case, however, was transferred to the Court of the District Magistrate, but he never agreed to produce the accused before that Court. His responsibility as surety ceased on the 7th December, when the case was transferred from the file of the Deputy Magistrate.

No one appeared for the Crown.

**STEVENS AND HARRINGTON JJ.** In this case a person named Sahebulla, who was accused of bad livelihood, appeared before the Deputy Magistrate on the 2nd December 1901. The case was fixed for December the 9th, and the accused was released on bail, the petitioner standing as surety for him. On the 7th December the case was transferred from the file of the Deputy Magistrate to the file of the District Magistrate. The accused appeared before the District Magistrate on the 9th December, but on the 12th December he absconded. Under these circumstances an order has been made forfeiting the bond executed by the petitioner as surety, and this Rule has been granted calling upon the Magistrate to show cause why that order should not be set aside on the ground that there has been no breach of the condition of the bond. A reference to the bond shows that what the surety guaranteed was that the accused person should attend at the Court of Babu Kherode Chunder Sen on every day on which the preliminary inquiry into the charge against him was being made; that is to say, that he should appear at the Court of the Deputy Magistrate, Babu Kherode Chunder Sen. The breach of

the condition is stated to be the non-appearance of the accused at the Court of the District Magistrate on the 12th December. That, in our opinion, is not a breach of the condition of the bond, because the petitioner only guaranteed the appearance of the accused before the Deputy Magistrate, and he did not guarantee that the accused should appear before the District Magistrate or before any person other than the Deputy Magistrate. No breach therefore of the condition of the surety-bond has been proved. The Rule is therefore made absolute, and we direct that the penalty, if paid, or so much of it as may have been paid, be refunded.

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*Rule made absolute.*

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RAMZAN ALI

v.

JANARDHAN SINGH.*

Jurisdiction—Attachment of “crops” cut and stored—“Crops or other produce of land,” meaning of—Criminal Procedure Code (Act V of 1898) ss. 145 and 146.

The words “crops or other produce of land” in s. s. (2) of s. 145 of the Criminal Procedure Code mean crops or other produce of land attached to the land. A Magistrate therefore has no jurisdiction under s. 146 of the Code to attach crops, which have been severed from the land and stored.

THE petitioners, Ramzan Ali and others, obtained a Rule calling on the District Magistrate to show cause why the order purporting to be made under s. 146 of the Criminal Procedure Code should not be set aside on the ground that the matter in dispute related to moveable property, which could not be made the subject of such proceedings.

On the report of the Sub-Inspector of the Tikari thanah, dated the 7th June 1901, the Deputy Magistrate of Gaya drew up proceedings under s. 145 of the Code of Criminal Procedure making the petitioners the first party and Janardhan Singh and others the second party, and on the 8th September 1901 passed an order under s. 146 of the Code attaching the subject-matter of the dispute, which consisted of certain crops, which had been cut and stored on the threshing-floor.

Babu Joy Gopal Ghosha for the petitioners. Proceedings under Chapter XII of the Code of Criminal Procedure relate only to immoveable property. The order in this case is for the attachment of moveable property—crops which had been cut and stored. The Magistrate has mistaken the meaning of the word “crops” in s. s. (2) of s. 145 of the Code, which means crops that are attached to the land, actually growing on it, and not crops that have been cut and stored.

Mr. P. L. Roy (Babu Karuna Sindhu Mukerjee and Babu Atulya Charan Bose with him) for the opposite party. Under the decisions of this Court I am unable to support the order.

* Criminal Revision No. 1160 of 1901, against the order passed by S. Ali Ashraf, Deputy Magistrate of Gaya, dated the 18th September 1901.

STEVENS AND HARRINGTON JJ. This Rule was issued to show cause why the order purporting to have been made under the provisions of section 146 of the Code of Criminal Procedure with reference to certain crops which had been cut and stored on the threshing-floor should not be set aside on the ground that the matter in dispute was moveable property, which could not be made the subject of proceedings under Chapter XII of the Code of Criminal Procedure. The learned District Magistrate in showing cause has invited our attention to sub-section (2) of section 145, which provides that "for the purposes of this section the expression 'land or water' includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property." We think it is clear that the learned Magistrate has mistaken the meaning of sub-section (2). Chapter XII, in which section 145 occurs, is headed "Disputes as to immoveable property," and we think it is clear that by "crops and other produce of land" in sub-section (2) are intended to be meant crops or other produce of land attached to the land, and not crops which have been severed, as in the present case. The learned Counsel, who appeared on the opposite side, does not contend that the provisions of section 145 can properly be applied to such properties.

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It follows that the order which has been made by the Deputy Magistrate in the present case attaching the cut crops, which were the subject-matter of dispute between the parties, cannot stand. The Rule is accordingly made absolute and the order is set aside.

D. S.

Rule made absolute.

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and 28.

MANINDRA CHANDRA NANDI

v.

BARADA KANTA CHOWDHRY.*

Jurisdiction—Criminal Procedure Code (Act V of 1898) s. 145—Magistrate, power of to stay proceedings and cancel order passed by him under s. s. (1)—Revision—High Court, interference by.

A Magistrate has jurisdiction to cancel an order passed under s. s. (1) of s. 145 of the Criminal Procedure Code and to stay proceedings if he becomes satisfied, whatever the source of information may be, that the state of things does not exist, which alone would give jurisdiction to proceed with the inquiry.

Where therefore a Magistrate, having instituted proceedings and passed an order under s. s. (1) of s. 145 received information, which he believed, that there no longer existed a dispute likely to cause a breach of the peace, and, before any written statement had been filed by either side, cancelled his order and stayed the proceedings.

Held, that the High Court could not interfere, as the Magistrate had not acted without jurisdiction.

Tarini Charan Chowdhry v. Amulya Ratan Roy(1) referred to; *Hurbullabh Narain Singh v. Luchmeswar Prosud Singh*(2) distinguished.

On the 10th June 1901 the Subdivisional Magistrate of Kurigram drew up proceedings under s. 145 of the Code of Criminal Procedure making Maharaja Manindra Chandra Nandi, Zemindar of Bahirband, the first party and Gopal Das Roy Chowdhry and others of Bhitband the second party. On the 27th June the first party applied for and obtained fifteen days' time to file his written statement and an Amin was ordered to measure the *chur* in dispute.

On the 24th July the Magistrate passed the following order :—

"Put up after disposal of the police case under ss. 144 and 379 of the Penal Code."

* Criminal Revision No. 1009 of 1901, against the order passed by Babu G. C. Dutt, Subdivisional Officer of Kurigram, dated the 5th of August 1901.

(1) (1893) I. L. R. 20 Calc. 987.

(2) (1898) I. L. R. 26 Calc. 188.

On the 5th August, before either party had filed any written statement, the Magistrate passed the following order :—

"It transpired in the course of the trial of the case of *Asir Mahmud v. Kardura Sardar and others* under ss. 144 and 379 of the Indian Penal Code, that the tenants of Bhitiband ploughed the disputed *chur* and destroyed the crops standing thereon, on the 6th Falgoun last, i.e., the day that the Civil Court Amin delivered possession, and Bahirband tenants took no steps to recover possession. It also transpired in evidence that the tenants of Bahirband left the *chur* after the Amin delivered possession. Thus the entire *chur* is now in possession of the tenants of Bhitiband, and it is unnecessary to institute any proceedings under s. 145 of the Criminal Procedure Code; so the case is struck off."

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In revision it was *inter alia* contended by the first party that the Magistrate had no jurisdiction to strike off the proceedings after having once instituted them, and that it was incumbent upon him to peruse the statements, if any, put in by the parties, to hear the parties, to receive the evidence produced by them, to consider the effect of such evidence, and then to decide whether any and which of the parties was at the date of the institution of the proceedings in possession of the subject-matter of dispute.

The Advocate-General (Mr. J. T. Woodroffe), Babu Pramathanath Sen, Babu Jyoti Prasad Sarbadhikari and Babu Tarak Chandra Chakravarti for the petitioner.

Babu Surendra Chunder Sen for the opposite party.

STEVENS AND HARRINGTON JJ. On the 10th June 1901 the Subdivisional Magistrate of Kurigram drew up a proceeding under the provisions of section 145 of the Code of Criminal Procedure, setting forth that between the present petitioner, Maharaja Manindra Chandra Nandi of Bahirband, and certain other persons, residents of Bhitiband, a dispute existed likely to cause a breach of the peace concerning certain land, and calling upon them to attend before him on the 27th June and to put in written statements of their respective claims as regards the actual possession of the land in question. Maharaja Manindra Chandra Nandi was made the first party in the proceedings, and the other persons were made the second party.

Time was asked for by the first party to enable him to prepare his written statement, and his application was granted. In the

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meantime an Amin was sent to measure the land which was supposed to be the subject-matter of the dispute. On the 24th July the Magistrate recorded the following order:—"Put up after disposal of the police case under ss. 144 and 379 of the Indian Penal Code."

Finally, on the 5th August 1901, the Subdivisional Magistrate passed the following order:—"It transpired in the course of the trial of the case of Asir Mahmud v. Kandura Sardar and others under ss. 144 and 379 of the Indian Penal Code that the tenants of Bhitiband ploughed the disputed *chur* and destroyed the crops standing thereon, on the 6th Falgoon last, *i. e.*, the day that the Civil Court Amin delivered possession, and Bahirband tenants took no steps to recover possession. It also transpired in evidence that the tenants of Bahirband left the *chur* after the Amin delivered possession. Thus the entire *chur* is now in possession of the tenants of Bhitiband, and it is unnecessary to institute any proceedings under s. 145 of the Criminal Procedure Code; so the case is struck off."

We may mention that at the time when this final order was passed no written statement had been filed by either party.

The first party then proceeded to present to this Court the petition on which the Rule now before us was issued. Objection was made to the final order of the Subdivisional Magistrate mainly on three grounds: *first*, that he had no jurisdiction to strike off the proceedings after having once instituted them, and that it was incumbent upon him to peruse the statements, if any, put in by the parties, to hear the parties, to receive the evidence produced by them, to consider the effect of such evidence, and then to decide whether any and which of the parties was at the date of the institution of the proceedings in possession of the subject-matter of dispute; *secondly*, that the Subdivisional Magistrate acted illegally in importing into the proceedings under section 145 and in relying upon evidence taken in another case, to which neither of the present parties was a party; and, *thirdly*, that the Subdivisional Magistrate took an erroneous view as to what constituted possession under section 145 of the Code of Criminal Procedure. The petitioner prayed that this Court

would set aside the order of the Subdivisional Magistrate, dated the 5th August 1901, and direct him to proceed according to law.

This Court has in effect been asked to set aside the order whereby the Subdivisional Magistrate struck off the proceedings which were pending before him, and to direct him to re-open the proceedings and to proceed to the inquiry as to possession provided for in sub-section (4) of section 145.

Now, it appears to us that the application of the petitioner is based upon an erroneous conception of the nature of a proceeding under section 145 and of the position of the parties to such a proceeding. The procedure provided by section 145 is intended solely for the purpose of preventing a breach of the peace where a dispute exists concerning any land, or water, or the boundaries thereof, which dispute, if no proceedings were taken, would be likely to cause a breach of the peace. The institution of such proceedings is a matter entirely within the discretion of the Magistrate. The existence of a dispute likely to cause a breach of the peace is a condition precedent absolutely necessary to give the Magistrate jurisdiction to enter upon an inquiry as to possession. There is a current of rulings of this Court by which it has been held that it is a necessary preliminary condition to proceedings under section 145, that a Magistrate, acting under the provisions of that section, shall record an order stating the grounds of his being satisfied that a dispute likely to cause a breach of the peace in fact exists. Any inquiry as to possession that is made under the provisions of that section is made, not for the purpose of strengthening the position of the one party or of the other party in the dispute between them, but because such an inquiry is necessary for the making of an order under sub-section (6) declaring the party in possession to be entitled to retain possession, until evicted from the property in due course of law, and forbidding all disturbance of such possession, until such eviction. Accordingly, sub-section (5) provides that nothing in the section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute exists or has existed, and in such case the Magistrate shall cancel the said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-section (1) shall be final.

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It has been contended by the learned Advocate-General for the petitioners that it is not open to the Magistrate to cancel an order made under sub-section (1) and to stay proceedings, unless one of the parties, or some other person interested, has shown that the supposed dispute does not exist or has not existed. But we are unable to understand why there should be any such limitation of the power of the Magistrate to stay his hand, if he has become satisfied, whatever the source of his information may have been, that the state of things does not exist which alone would give him jurisdiction to proceed with the inquiry. When once he has such information before him, the whole object of the proceeding ceases and any inquiry that he might make would become a mere inquiry in a civil dispute—an inquiry of a kind which is not ordinarily within the jurisdiction of a Magistrate.

We may refer to the case of *Tarini Charan Chowdhry v. Amulya Ratan Roy*(1) as recognising that a Magistrate may stay his hands when it appears to him that there is a cessation, even for the time being, of any likelihood of a breach of the peace. In that case, after written statements had been filed in the ordinary course, the parties presented petitions, asking for an opportunity, either to have their boundaries demarcated or to settle their dispute by arbitration. The Magistrate passed an order striking off the case under section 145. We may quote the following passage at page 868 of the judgment of this Court in that case: “Now the first question which arises is the effect of an order striking off proceedings under section 145 of the Code of Criminal Procedure. As Mr. Woodroffe has told us, there is a series of decisions with regard to the effect of striking off the file of a Court applications in civil matters; but we think that those stand on an entirely different footing from proceedings of a *quasi*-criminal description. The section itself provides for a case, where a Magistrate can cancel his order. Those are cases where parties show him that no dispute exists, and if the likelihood of a breach of the peace has ceased to exist before the proceedings under section 145 have terminated, it follows that there can be no necessity for a continuation of such proceedings. The result

(1) (1898) I. L. R. 20 Calc. 867.

of those applications which were sanctioned by the Magistrate practically amounted to cessation, at any rate, for the time being of any likelihood of a breach of the peace. That must have been the view which the Magistrate took of it, as he considered it unnecessary to proceed, at any rate then, with those proceedings. We think that, unless it can be shown that there is a legislative enactment, giving a power to that effect, cessation by the order of the Magistrate of any criminal proceedings must, until that order is set aside, operate not only as staying the proceedings, but destroying them."

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The learned Advocate-General has cited the case of *The Empress v. Ganpat Kalwar* (1) as an authority for the proposition that the Magistrate is bound to hear the evidence adduced by the parties in a case under section 147 of the Code, as in a matter under section 145. What the Magistrate had done in that case was to make an order under section 147, adverse to one of the parties, on a mere inspection of the locality without taking evidence, and this Court held that it was not in his power to dispose of the case in that manner on such materials. The case does not go further than that.

We think it clear that a party to a proceeding under section 145 is not in the position of a plaintiff in a civil suit who has set the Court in motion and has a right to require a decision upon the questions raised by him. If a Magistrate either refuses to make an order under sub-section (1) of section 145, or, having made such an order, subsequently cancels it on the ground that a dispute does not exist likely to cause a breach of the peace, no private person has any *status* in our opinion to contest the propriety of his refusal to make an inquiry into the question of possession.

Another question of very great importance raised by the present rule is, whether this Court has jurisdiction to interfere with such an order as that which has been made by the Sub-divisional Magistrate in this case. The law regulating the powers of this Court to interfere on revision with orders of the present kind has been altered by sub-section (3) of section 435 of the Code of Criminal Procedure. It was held by this Court in the case

(1) (1900) 4 C. W. N. 779.

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of *Hurbullubh Narain Singh v. Luchmeswar Prosad Singh*(1) that the effect of this alteration in the law was to place matters under Chapter XII of the Criminal Procedure Code, that is, under section 145, amongst other sections, in the same category as orders under section 143 and section 144. It was pointed out that in regard to an order under section 143 or section 144, it had been held in many cases, so as to have become settled law, that though the powers of a Court of Revision under the Code could not be exercised, still if an order was challenged to be without jurisdiction, that is to say, if it be outside the section, the mere fact of the order purporting to be so passed would not bring it within the section, so as to debar the exercise of the powers under section 15 of the Charter Act to set it aside as null and void and without jurisdiction.

We think that the present case does not come within the rule of the reported case to which we have just referred. It is, no doubt, the case that this Court has, from time to time, ever since the enactment of the present Criminal Procedure Code, Act V of 1898, interfered to set aside bad orders made under section 145 affecting a party to the proceeding ; but it seems to us that there is a very obvious distinction between such an order and an order of the nature now before us, in which the Magistrate does not make any order affecting either of the parties, but refuses to make such an order at all. Had the order now before us purported to declare the possession of the one party or of the other and to forbid disturbance of such possession under the provisions of sub-section (6) of section 145, it might well have been that our interference might have been called for.

It has been contended by the learned Advocate-General that, inasmuch as the Subdivisional Magistrate states that according to the information before him possession lies with the Bhtarband tenants, the order practically amounts to one under sub-section (6). But we are unable to accede to this proposition. It appears to us that the order has not and cannot have any such legal effect. The legal position in our view is precisely what it would have been, if no proceedings under section 145 had been instituted at all.

(1) (1898) I. L. R. 26 Calc. 188.

What the Subdivisional Magistrate in effect says is that he had at the time of making that order information before him which was not available to him when he made the order under sub-section (1) of section 145; and that had the information been available to him at that time, he would not have drawn up an order stating that he was satisfied that a dispute likely to cause a breach of the peace existed, and he has accordingly cancelled the original order. The order striking off the proceedings does not amount to an adjudication of the question of possession for the purposes of sub-section (6) of section 145.

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It has not been shown to us that either before or since the passing of the Act of 1898 this Court has ever directed the institution of proceedings under section 145, or the revival of such proceedings, when they have been stayed by the Magistrate. On the contrary, in the case of *Ekram Singh*(1), where it was contended that proceedings had been wrongly had under section 107 of the Code of Criminal Procedure, and that proceedings ought to have been instituted under section 145, it was distinctly held by this Court that it was incompetent to direct proceedings to be taken under section 145.

The learned Advocate-General has referred us to the case of *Dolegobind Chowdhry v. Dhanu Khan*(2), in which it was held that where a dispute existed likely to cause a breach of the peace concerning land, proceedings ought to be instituted under section 145 and not under section 107. But in that case all that this Court did was to set aside the order which had been made under section 107 on the ground that it was binding on one party and left the other party free without any adjudication as to possession; but no order was made by this Court directing the institution of proceedings under section 145.

Only one case has been cited to us in which this Court has directed the Magistrate to take any action by way of completing proceedings under section 145, that is the case of *Kefatullah v. Ferusuddin Miah*(3). In that case, however, the proceedings had not been stayed by the Magistrate. An order had been passed summarily without evidence adversely to one of the parties, who had

(1) (1899) 3 C. W. N. 297.

(2) (1897) I. L. R. 25 Calc. 559.

(3) (1900) 5 C. W. N. 71.

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failed to file a written statement. This Court set aside that order and directed that the case must be tried in accordance with law.

We may mention another case which has been cited for the petitioner as showing that this Court has interfered in proceedings of this nature. That is the case of *The Katras-Jherriah Coal Company v. Sibkrishta Daw and Company*(1). There it was held that an order which had been made under section 145 had been improperly made, and this Court substituted an order of attachment under section 146. That case was thus one of a wholly different character from the case before us, and, moreover, it was decided before the present Code of Criminal Procedure, Act V of 1898, came into force.

In the views which we have expressed with reference to the powers of the Magistrate, the *status* of the parties and the jurisdiction of this Court, it is unnecessary for us to notice more particularly the second and third of the objections which we have stated above, namely, that effect was given in the present case to evidence which had been taken in another case, and that the view of the Subdivisional Magistrate as to what constituted possession was erroneous.

For the reasons which we have stated we must decline to interfere, and we accordingly discharge the Rule.

D. S.

Rule discharged.

(1) (1894) I. L. R. 22 Calc. 297.

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v.
BRINDA BELDER.*

1902
March 5.

Process—Process to compel attendance of witness, issue of—Refusal to compel attendance of such witness—Magistrate, discretionary power of—Summons-case—Criminal Procedure Code (Act V of 1893) s. 244.

There is no discretionary power given in summons-cases to a Magistrate by s. 244 of the Criminal Procedure Code to refuse to compel the attendance of a witness, upon whom the Court has already issued process.

THE petitioners, Daulat Singh and others, obtained a Rule calling upon the District Magistrate to show cause why the order of the Magistrate refusing to issue fresh processes for the attendance of the witnesses cited by the accused and served with summonses should not be set aside and the proceedings reopened.

The petitioners were charged and convicted under s. 143 of the Indian Penal Code by the Deputy Magistrate of Maldah, on the 1st November 1901, and sentenced to pay a fine each. On the same day, before the case was called on, an application was filed on behalf of the accused, praying for the issue of warrants or fresh summonses for the attendance of eight of the material witnesses on behalf of the defence, who did not appear in Court, although duly served with summonses, but the Deputy Magistrate rejected their application and convicted them.

Babu Samatul Chunder Dutt for the petitioners. S. 244 of the Code of Criminal Procedure applies only to cases where the accused applies for the issue of processes to compel the attendance of witnesses, who have not been summoned before, and not to cases of this description. Here the Court has already issued processes, which have been served on the witnesses, and they have failed to appear. They are in contempt. The Court, I submit, is bound to enforce the carrying out of its own orders, and to compel these witnesses to attend, and has no discretion whatever in the matter.

* Criminal Revision No. 1061 of 1901, against the order passed by Babu Suresh Chunder Chatterjee, Deputy Magistrate of Maldah, dated the 1st of November 1901.

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STEVENS AND HARRINGTON JJ. This Rule was issued to show cause why the order of the Magistrate refusing to issue fresh processes for the attendance of the witnesses who had been cited by the accused and served with summonses should not be set aside and the proceedings reopened.

The Deputy Magistrate, who tried the case, has submitted an explanation. He explains that as the case was a petty summons-case and had been pending for some time, it was not thought fit to allow any more processes under the discretionary power given in section 244 of the Criminal Procedure Code.

We think that there is no discretionary power given by section 244 of the Criminal Procedure Code to refuse to compel the attendance of a witness upon whom the Court has already issued process.

The conviction is set aside, and the case will be reopened and decided afresh after compelling the attendance of the witnesses in question, and taking and considering their evidence. In the meantime the fines, if levied, or so much thereof as may have been levied, must be refunded.

D. S.

FULL BENCH.

BENI MADHUB KURMI

v.

KUMUD KUMAR BISWAS.*

1903

May 3.

Compensation—Accused, order for payment of compensation to—Case which is false as well as frivolous or vexatious—Criminal Procedure Code (Act V of 1898) s. 250.

Held, by the Full Bench (PRINSEP C. J. dissenting), that an order under s. 250 of the Code of Criminal Procedure, for the payment of compensation to an accused person can be made in a case which is false as well as frivolous or vexatious.

Parsi Hajra v. Bandhi Dhanuk (1) overruled.

THE complainant Beni Madhub Kurmi charged Kumud Kumar Biswas and his servant, Ibrahim, with assaulting him and carrying off his *alwan*. The first accused denied having assaulted the complainant at all, while the second accused stated that the complainant was drunk and causing annoyance, and that he (Ibrahim) pushed him away, and upon his using abusive language gave him two slaps. The accused were tried by the Joint Magistrate of Rajshahye, who acquitted them on the 22nd January 1902 and ordered the complainant to pay Rs. 25 as compensation to the first accused.

The order of the Magistrate was as follows:—

“The complainant has completely failed to prove his case. The charge of assault against Kumud Babu is obviously false. It has been aggravated by suggestions of theft or rather perhaps illegal detention of the *alwan* and by the mention of the prostitute's house. The accused is a man of respectable position and such a charge against him is clearly frivolous and vexatious. All that happened was a petty scuffle on the embankment. The complainant was very probably drunk and he got a few slaps from Ibrahim, which he seems to have deserved. The charge against Kumud Kumar is grossly exaggerated and vindictive and compensation should be awarded.”

* Reference to Full Bench in Criminal Revision No. 77 of 1902 and No. 73 of 1902.

Full Bench: Sir Henry T. Prinsep, Chief Justice (offg.), Mr. Justice Bannerjee, Mr. Justice Hill, Mr. Justice Stevens and Mr. Justice Henderson.

(1) (1900) I. L. R. 28 Cal. 251.

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The matter was referred to the High Court under s. 438 of the Code of Criminal Procedure by the Sessions Judge of Rajshahye, who recommended the setting aside of the order for compensation under s. 250 of the Code.

The case came up for hearing before STEVENS and HARINGTON JJ. on the 8th May 1902, who made the following reference to the Full Bench:—

This is a reference made by the Sessions Judge of Rajshahye, under the provisions of s. 438 of the Code of Criminal Procedure, for the revision of an order for compensation made by the Joint Magistrate, under s. 250 of the Code, in the following circumstances:—

One Beni Madhub Kurmi charged Kumud Kumar Biswas and his servant, Ibrahim, with assaulting him and carrying off his *alwan*. The case of the latter defendant was that the complainant was drunk and causing annoyance, and that Ibrahim pushed him away, and on his using abusive language gave him two slaps. The former defendant Kumud Kumar Biswas denied that he ever assaulted the complainant at all.

The Joint Magistrate of Rajshahye, before whom the case was tried, believed the defendants' version of the story, and considering the matter a petty scuffle, acquitted both defendants and called on the complainant to show cause why he should not be ordered to pay compensation to Kumud Kumar Biswas under s. 250 of the Criminal Procedure Code; after hearing the complainant and his pleader, the Magistrate, in disposing of the case, gave the following judgment:—

"The complainant has completely failed to prove his case. The charge of assault against Kumud Babu is obviously false. It has been aggravated by suggestions of theft or rather perhaps illegal detention of the *alwan* and by the mention of the prostitute's house. The accused is a man of respectable position and such a charge against him is clearly frivolous and vexatious. All that happened was a petty scuffle on the embankment. The complainant was very probably drunk and he got a few slaps from Ibrahim, which he seems to have deserved. The charge against Kumud Kumar is grossly exaggerated and vindictive and compensation should be awarded."

The learned Sessions Judge recommends that the order made by the Joint Magistrate, under s. 250 of the Code of Criminal Procedure, be set aside on these grounds:—

First. That the Joint Magistrate took an erroneous view of the facts of the case;

Secondly. That the proceedings under s. 250 of the Code of Criminal Procedure ought to have been on a separate record;

Thirdly. That upon the facts found by the Joint Magistrate, the case against the defendant, Kumud Kumar Biswas, was not only frivolous or vexatious, but was also false, and therefore s. 250 of the Code of Criminal Procedure had no application.

With reference to the first ground, we think that it would not be safe for us, upon a necessarily imperfect record of a trial held by the summary procedure, to question the finding of the Joint Magistrate, who had the witnesses before him.

The second ground appears to us to require no notice.

The third ground is stated by the learned Sessions Judge as follows :—

"Section 250 does not apply. The Joint Magistrate finds the case against Kumud Kumar 'obviously false.' If so, the complainant could be prosecuted for perjury but not ordered to pay compensation to the accused. It is true, that four lines lower down in his judgment the Joint Magistrate says the case against Kumud Kumar was 'clearly frivolous and vexatious;' but, if his judgment means anything, it means, I think, that he believed that Kumud Kumar did not strike the complainant with a stick as he (that is, apparently the complainant) says he did."

The learned Sessions Judge does not cite any authority in support of the view of the law which he sets forth; but we presume that he had in mind the recent case of *Parsi Hajra v. Bandhi Dhanuk* (1), which is an authority for the proposition that s. 250 is not applicable in a case in which the accusation is absolutely false.

In that case the Magistrate found that "the case was false and must have been vexatious to the accused in the extreme," and made an order for payment of compensation under s. 250.

In setting aside that order the learned Judges say :—

"But s. 250 of the Code of Criminal Procedure does not contemplate that compensation shall be awarded, because the case is found to be false. If it had been so intended by the Legislature, the law would have been so expressed. S. 211 of the Penal Code, on the other hand, expressly makes the instituting of a false case with the intent to injure an accused and with knowledge that there is no just or lawful ground for the accusation an offence, and the finding of the Magistrate is that such offence has been committed. The Magistrate has consequently in a summary proceeding convicted the complainant of that offence without a proper trial, which obviously is altogether improper and open to serious objection. The words 'frivolous' and 'vexatious' in s. 250 indicate an accusation merely for the purposes of annoyance, not an accusation of an offence which is absolutely false. If this reasoning be correct, it follows that an order, under s. 250, cannot be made in any case in which a prosecution under s. 211 of the Penal Code can be had, i.e., in any case where a false charge is made knowingly with intent to injure, irrespective of whether it is frivolous or vexatious."

With great respect to the learned Judges, who decided the case, we are unable to agree in this view. It seems to us that an award of compensation to an accused person, under s. 250 of the Code of Criminal Procedure, where an accusation is found to be false, does not amount to a conviction of the complainant of an offence punishable under s. 211 of the Penal Code, but is an order of a different nature, made, not for the punishment of the person making the accusation, but to compensate the person who has been unnecessarily and improperly brought into Court to answer that accusation.

(1) (1900) I. L. R. 28 Cal. 251.

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We are supported in our view by the ruling in the case of *Bechu Lal v. Jagdam Sahai*(1) in which the Court, while setting aside an order under s. 250, on the ground that it was made in the improper exercise of the Magistrate's discretion, laid down that it was not illegal for a Magistrate both to award compensation to the accused (under s. 250) and also to direct the prosecution of the complainant (under s. 211 of the Indian Penal Code), for bringing a false charge, although a Magistrate, who adopted that course, would be exercising his discretion improperly.

This was held to be the effect of the rulings in the case of *Queen v. Nupon Rai*(2) and in that of *Shib Nath Chong v. Sarat Chunder Sarkar*(3) taken together.

In the former case, it was held that the Magistrate was competent to award compensation to the persons accused, notwithstanding that he afterwards committed, and even if he had then made up his mind to commit the complainant for trial on the charge of giving false evidence. Reference was made to a previous decision of this Court as follows:—"It seems to have been held by this Court in 1865 that a Magistrate might award compensation under s. 270 (the provision of the Code of Criminal Procedure then in force, namely, Act XXV of 1861, corresponding to s. 250 of the present Code) and also give his sanction to a prosecution under s. 211 of the Penal Code."

In the case of *Shib Nath Chong v. Sarat Chunder Sarkar*(3), it does not seem to have been intended to lay down that it was illegal to apply the provisions of s. 560 of the Code of Criminal Procedure then in force (Act X of 1832) answering to s. 250 of the present Code, in any case in which the accusation was found to be false as well as frivolous or vexatious, but that it was an improper exercise of discretion to do so when the Magistrate considered that the complainant should be prosecuted for an offence under s. 211 of the Penal Code and sanctioned or directed such a prosecution.

It appears to us that the cases of *Bechu Lal v. Jagdam Sahai*(1) and *Parai Hajra v. Bandhi Dhanuk*(4) are in conflict.

We agree with the view expressed in the former case. S. 250 in terms applies to any case instituted by complaint or upon information given to a Police-officer or to a Magistrate in which the accusation is found to be frivolous or vexatious, and we can find nothing which excludes from its operation cases in which the accusation besides being frivolous or vexatious is also found to be false. Indeed, it would seem to be the case that the great majority of frivolous or vexatious accusations that come to trial must almost of necessity contain an element of falsity, greater or less. Accusations which are in themselves merely frivolous, though perfectly true, should, in the ordinary course, be shut out by a Magistrate, when dealing with the complaint, as coming within the provisions of s. 95 of the Penal Code.

The question which we refer to a Full Bench is—

Can an order under s. 250 of the Criminal Procedure Code, for the payment of compensation to an accused person, be made in a case which is false as well as frivolous or vexatious?

(1) (1898) I. L. R. 26 Calc. 181.

(2) (1871) 6 B. L. R. 296.

(3) (1895) I. L. R. 22 Calc. 586.

(4) (1900) I. L. R. 28 Calc. 251.

Babu Promatha Nath Sen for the accused. The object of s. 250 of the Code of Criminal Procedure is to compensate and not to punish, and there is nothing in that section to limit its operation only to cases which the Magistrate finds to be frivolous and vexatious. The case of *Parsi Hajra v. Bandhi Dhanuk* (1) has taken an incorrect view of the law. The section does not prevent punishment when an offence is committed under the Penal Code, nor does it bar a civil suit, if a civil wrong is involved. S.s. 5 of s. 250 in fact contemplates a civil suit, as it provides that at the time of awarding compensation in any subsequent civil suit relating to the same matter, the Civil Court shall take into account any compensation paid or recovered under this section. The principle is the same as that upon which costs are given in a civil suit.

The converse case is provided for by s. 545 of the Code, which empowers the Court to defray the expenses or compensate the prosecution.

There is also s. 553 of the Code, which empowers the Magistrate to give compensation to persons groundlessly given in charge in Presidency towns. If the view in the above-mentioned case is correct, the scope of s. 553 must also be limited in the same way.

In the earlier law the word "amends" was used, showing that the intention was to compensate and not to punish—see s. 270 of Act XXV of 1861.

Section 211 of the Penal Code, which provides for punishment for instituting a false charge, in no way helps the accused beyond satisfying his vindictiveness. If he wishes to be compensated, he must go to the Civil Court. S. 250 of the Code of Criminal Procedure, on the other hand, provides for speedy compensation, after the receipt of which the complainant may not think it worth while to seek the aid of the Civil Court. The remarks in the case of *Parsi Hajra v. Bandhi Dhanuk* (1), to the effect that the Magistrate had in a summary proceeding convicted the complainant of the offence under s. 211 of the Penal Code without a proper trial, are not well founded. The same might be said of every case which is dismissed as false. If a classification were

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made of cases under the heading of true, false, frivolous, and vexatious, your Lordships would find that a true case may be frivolous, see s. 95 of the Penal Code, or vexatious, and a vexatious accusation may end in a conviction, in which case s. 250 would not apply, or it may not end in a conviction, under which circumstances the Magistrate would have discretion to award compensation.

A false charge may, on the other hand, be frivolous and brought without knowledge on the part of the complainant that it was false, and then compensation should be given, or it may be vexatious when brought with knowledge on the part of the complainant; in that case, the summary remedy may be given under s. 250 and a prosecution under s. 211 of the Penal Code may also be sanctioned, if the Court thinks it is a proper case.

A frivolous accusation may be true and come under s. 95 of the Penal Code, or it may be false, and, if brought without knowledge on the part of the complainant, the proper remedy would be under s. 250. A vexatious accusation may be true, and end in a conviction, when s. 250 will not apply, or it may not end in a conviction, and then s. 250 may be applicable. But where a vexatious accusation is found to be false, s. 250 is the proper remedy, and it does not bar the other remedy under s. 211 of the Penal Code. The cases which support my view are *Queen v. Rupan Rai*(1), *Shib Nath Chong v. Sarat Chunder Sarkar*(2); *Bachu Lal v. Jagdam Sarkar*(3), and *Adikkan v. Alagan*(4).

No one appeared for the complainant.

BAKER J. The question referred to us for determination is this :—

“Can an order under section 250 of the Criminal Procedure Code, for the payment of compensation to an accused person, be made in a case which is false as well as frivolous or vexatious?”

The reference has been rendered necessary in consequence of the learned Judges before whom this case came on for hearing

(1) (1871) 6 B. L. R. 296.

(2) (1895) 1. L. R. 22 Calc. 586.

(3) (1898) 1. L. R. 26 Calc. 181.

(4) (1897) 1. L. R. 21 Mad. 237.

being unable to agree in the view taken by a Division Bench of this Court in the case of *Parsi Hajra v. Bandhi Dhanuk*(1).

The answer to the question depends upon the construction of section 250 of the Code of Criminal Procedure. That section enacts that, if in any case instituted by complaint or upon information given to a police-officer (I refer to so much only of the section as bears upon the question now before us) a person is accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits the accused, and is satisfied that the accusation against him was frivolous or vexatious, the Magistrate may, by his order of discharge or acquittal, direct the person on whose complaint or information the accusation was made, to pay to the accused such compensation not exceeding fifty rupees as the Magistrate thinks fit; and it provides that at the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any compensation paid under this section.

If then an accusation is "frivolous" or "vexatious," the fact of its being false as well cannot disentitle the accused to compensation under section 250.

As qualifying an accusation, the term frivolous indicates that the accusation is of a trivial nature, but it may or may not be false; and the term vexatious implies that the accusation is one which ought not to have been made in a Criminal Court, and which is intended to harass the accused. But neither of the two words excludes the element of falsehood in the charge. Then, again, a charge that is false must also be vexatious, though it may not be frivolous as well. There is, therefore, no reason why a case in which the accusation is false should be considered as being outside the scope of the section. The object of the section is not to punish the complainant, but, by a summary order, to award some compensation to the person against whom a frivolous or vexatious accusation is brought, leaving it to him to obtain further redress against the complainant, if he seeks for it by a regular civil suit or criminal prosecution.

(1) (1900) I. L. R. 28 Cal. 251.

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In the case of the *Queen v. Rupen Rai*(1), it was held that under section 270 of the Criminal Procedure Code of 1861 (Act XXV of that year), as amended by Act VIII of 1869 which corresponded to section 250 of the present Code, the Magistrate was competent to award compensation to the person accused, notwithstanding that he afterwards committed, and even if he had then made up his mind to commit, the complainant to take his trial on the charge of giving false evidence. It is true that the provisions of section 250 of the present Code are, in some respects, different from those of the old Code, but the difference does not affect the question now before us. The same view is affirmed in the case of *Bachu Lal v. Jagdam Sahai*(2), though the order awarding compensation under section 250 of the Code was set aside on the ground that the Magistrate in making that order had exercised his discretion improperly. In the case of *Shib Nath Chong v. Sarat Chunder Sarkar*(3), there are certain observations in the judgment of this Court which no doubt conflict with the above view; but those observations are in the nature of *obiter dicta*, as the real ground upon which the order awarding compensation was set aside is given in the following passage of the judgment:—

“In the present case the Sessions Judge has set aside the sanction to prosecute, and we agree in the reasons which he has given in his judgment for so doing; and we think that for the same reasons, we must set aside the order made under section 560 of the Code of Criminal Procedure.”

The case really in conflict with the view I take is that of *Parsi Hajra v. Bandhi Dhanuk*(4). The reasons for the decision in this case are, first, that the words “frivolous” and “vexatious” indicate an accusation merely for the purpose of annoyance, not an accusation of an offence which is absolutely false, and, secondly, that by awarding compensation the Magistrate in a summary proceeding convicts the complainant of an offence under section 211 of the Penal Code without a proper

(1) (1871) 6 B. L. R. 296.

(2) (1898) I. L. R. 26 Calc. 181.

(3) (1895) I. L. R. 22 Calc. 586.

(4) (1900) I. L. R. 28 Calc. 261.

trial. But, as I have pointed out above, the words referred to do not exclude the case of a false accusation; nor does an order under section 250 amount to a conviction of the complainant for the offence of bringing a false charge. I must, therefore, for the reasons given above, respectfully dissent from the view taken in the last-mentioned case, and answer the question referred to us in the affirmative.

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HILL J. I agree in the judgment of my brother Banerjee and have nothing to add.

SEEVERE J. I also concur.

HENDERSON J. I also agree in this judgment.

PRINSEP C. J. I cannot agree in regarding a case in which an order of acquittal or discharge has been passed on the ground that it is false as within the terms frivolous and vexatious under section 250 of the Code of Criminal Procedure. I cannot agree that a false charge is frivolous. That expression does not, as I understand it, mean false, for a false charge necessarily implies something intentional, which is not the meaning of frivolous. An intentionally false complaint cannot, in my opinion, be justly regarded as frivolous. The two words "frivolous or vexatious" as used in section 250 of the Code of Criminal Procedure, should, in my opinion, be regarded as *ejusdem generis*. Every false complaint must necessarily be vexatious, because every complaint, even if true, must be vexatious, and if it be false, there must be an additional degree of vexation caused, but in my opinion the expression "vexatious complaint or information" should not be so understood, but it should be understood in the same sense as "frivolous" to which it is coupled, that is, a complaint or information causing annoyance and made for that purpose. If the law intended to include a false complaint or information, I think that it would have been differently expressed.

The different forms in which the law has been expressed in regard to this subject are remarkable.

In the first Code of 1861, section 270, "amends" as it was termed could be awarded to the accused person "in any case where

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the Magistrate shall dismiss the complaint as frivolous and vexatious." This was amended by Act VIII of 1869, which altered the words frivolous and vexatious to frivolous or vexatious and otherwise extended a Magistrate's powers in regard to the amount which he might award.

The Code of 1872 re-enacted the law as it appeared in the amending Act of 1869.

The Code of 1882, section 250, was in the following terms :—If in any case instituted upon complaint a Magistrate acquits the accused under section 245 or section 247, and is of opinion that the complaint was frivolous or vexatious, he may, in his discretion, by his order of acquittal, direct the complainant to pay, etc., etc.

Compensation could, as in former Codes, be given to an accused person only in a summons-case, for all the sections referring to this subject appear in the Chapter headed "of the trial of summons cases by Magistrates."

In the next place, it may be noted that the Legislature in 1882 further explained the incidence of this section by limiting it to acquittals under section 245 or section 247. Section 245 related to acquittals after trial, and section 247 to acquittals on the non-appearance of the complainant on the day of hearing.

The Code of 1898 has again modified the law. It has applied it to cases "instituted by complaint or upon information given to a police-officer or to a Magistrate." Under all the former Codes compensation could be given only in a case "instituted upon complaint." It has further applied it to a warrant case, for it enables a Magistrate to award compensation to an accused person, when he has discharged that person and an order of discharge can be passed only in a warrant case. As in the former law, it requires the Magistrate to be satisfied that the accusation was frivolous or vexatious. There has been also a very important amendment of the law expressed in the Code of 1882 and in the earlier Codes, because the present law does not limit an order for compensation to a summons case or to a case instituted upon complaint, but still in regard to the finding of the Magistrate that the case set up was frivolous or vexatious, the law has remained unaltered. If the law has been so extended in regard to the class of cases

contemplated and similarly expressed as to their character being frivolous or vexatious, it seems to me that, if it were intended to make it apply to a false case it would have been otherwise expressed. I confess that I am unable to follow the reasons upon which *Bachu Lal v. Jaydam Sahai*(1), said to be in conflict with *Parsi Hajira v. Bandhi Dhanuk*(2), proceeded. It was there held that the order for compensation to the accused could be passed if the complaint was dismissed as false; but that, as the Magistrate had also taken proceedings under section 211 of the Penal Code, he had not exercised a proper discretion in awarding compensation because "the direction to prosecute was in full force." If it were a valid order, it was sound whatever else might follow. A prosecution under section 211 of the Penal Code might follow in the same way as a civil suit, such as is contemplated by the latter part of section 250 of the Code of Criminal Procedure.

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In my opinion, section 250 of the Code of Criminal Procedure does not apply to a case which has been found to be false, because it is not frivolous or vexatious—words which should be interpreted as *ejusdem generis* and indicating a case of a different description.

D. S.

(1) (1898) I. L. R. 26 Calc. 181.

(2) (1900) I. L. R. 28 Calc. 251.

APPELLATE CIVIL.

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RAM PERSHAD

v.

JAGANNATH RAM.*

Appeal—Civil Procedure Code (Act XIV of 1892) ss. 244, cl. (c), 245, 250, 252—Execution of decrees—Parties to the suit—Defendants exempted from decrees—Questions relating to execution, discharge or satisfaction of decrees—Claim or objection to attached property.

Defendants, who are exempted from the operation of a decree, are not parties to the suit within the meaning of s. 244, cl. (c), of the Civil Procedure Code, and there is therefore no appeal from an order disallowing a claim preferred by them to properties attached in execution of the decree.

THE claimants-objectors, Ram Pershad Pandey and others, appealed to the High Court.

In 1879, Hardeo Das and others, mortgagees, instituted a mortgage suit against Kartic Nath Pandey and another, the defendants 1st party, and several other defendants, and in February 1880, a compromise decree was passed, with the consent of the plaintiffs, the defendants 1st party and the defendants 4th party, and in the absence of the remaining defendants, in the following terms:—

“That the plaintiffs’ claim be decreed for Rs. 55,000 in accordance with the compromise effected between the parties against Kartic Nath Pandey and Prem Lal, defendants 1st party; that the said defendants do pay the aforesaid decretal money, with interest at the rate of 5 per cent. per mensem, according to the instalments which are mentioned in the petition of compromise, and in the event of their defaulting, the plaintiffs shall have the power to recover the instalments and interest as described in the said petition; that any shares out of the shares entered in the mortgage bond, the release of which is prayed in the said petition of compromise and in the petition of compromise of the defendants 4th party, be entirely exempted

* Appeal from Order No. 252 of 1900, against the order of Babu Kali Kumar Bose, Subordinate Judge of Bhagalpur, dated the 12th of June 1900.

from the lien of this decree, and the mortgage lien be maintained on the remaining share, until the payment of the whole of the decretal money; that, in the event of the decretal money not being paid off by the said defendants 1st party, the plaintiffs shall recover the decretal money, principal with interest, by the auction sale, in the first instance, of the mortgaged properties which have not been exempted, and afterwards from the persons and other properties of the said defendants; that the other defendants be exempted."

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In the petition of compromise filed by the defendants 1st party, the following clause was inserted:—

"As the mortgaged properties are properties acquired by these defendants, and a bond debt has been taken by these defendants, therefore it is not necessary to pass a decree against Babu Ram Pershad Pandey and Babu Ajudhya Pershad Pandey, sons of Kartic Nath Pandey, and Hari Pershad Pandey, Jai Pershad Pandey and Govind Pershad Pandey, sons of Prem Lal Pandey, defendants; but they as the heirs of these defendants shall be liable for the decretal money."

In execution of the said mortgage decree, after the sale of the mortgaged properties, certain other properties were attached as belonging to the said defendants 1st party. Thereupon the present objectors, the said defendants, Ram Pershad Pandey and Ajudhya Pershad Pandey, preferred a claim to the properties attached, on the ground that as the properties belonged jointly to them and the judgment-debtor, Kartic Nath Pandey, and as they, the objectors, were exempted from liability under decree, their shares of the properties could not be attached in satisfaction of the decree.

The Subordinate Judge disallowed the claim, holding that the objectors had failed to prove their title to, and possession of, the attached properties. From this decision the objectors appealed to the High Court.

*Babus Dwarkanath Chakravarti and Joygopal Ghosal for the appellants.*

*Dr. Anutosh Mookerjee and Babu Anutosh Mookerjee for the respondents.*

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**AMEER ALI AND PRATT JJ.** The defendants, Kartick Nath Pandey and Prem Lal Pandey, mortgaged certain properties to the plaintiffs, decree-holders, respondents before us, who brought a suit upon their mortgage, making not only the mortgagors, but also their sons, the appellants in this Court, besides other people, who had become interested in the mortgaged properties, parties to the action. On the 6th of February 1880, a settlement was arrived at between the plaintiffs in that suit and the principal defendants and Luchmiput Singh, the 4th party defendant. Upon the basis of that settlement a decree was made on the 26th of February, which is marked as exhibit 3 in these proceedings, and the question involved in this appeal turns upon the construction of certain passages contained therein. In the ordering part of the decree, the plaintiffs are declared entitled to recover, by instalments, Rs. 55,000, with interest in accordance with the compromise; in default, there was to be the usual mortgage decree. The property in the hands of the defendant 4th party, Luchmiput Singh, was entirely exempted from the mortgagee's lien. The decree then went on to add that "the other defendants be exempted." Apparently default was made in the payment of the instalments, and the mortgage decree was put in execution and partially satisfied by the sale of the mortgaged premises. For the balance the decree-holders took out execution against certain other properties, which they alleged to be separately acquired properties of their mortgagors. The sons of the latter thereupon put in an objection before the Subordinate Judge of Bhagalpur, alleging that the properties attached were ancestral properties which they held jointly with the judgment-debtors, and as the decree had been made only as against their fathers, their shares should be released from attachment.

The learned Subordinate Judge on the 12th June 1900 held that as no satisfactory evidence had been given in support of the allegation that the properties against which execution had been taken out were joint ancestral properties of the family, of which the present appellants were members, their objection was untenable. He also found that Kartick Nath Pandey and Prem Lal Pandey had acquired the properties in question from

the fund of their separate karbar, and on that ground also the decree-holders were entitled to proceed against them. It is unnecessary to refer to the third ground taken by him. In the result, he disallowed the claim with costs.

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The sons of the judgment-debtors have now appealed to this Court. A preliminary objection was taken on behalf of the decree-holders that as the matter in dispute fell within the provisions of section 278 of the Code of Civil Procedure, and, inasmuch as the question was not between the parties to the suit within the meaning of section 244, no appeal lay to this Court.

There seems to be some conflict of opinion between the different High Courts regarding the meaning to be attached to the words of clause (c), section 244, which runs as follows :—

“Any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof.”

The Madras High Court has gone so far as to hold that, if a person was a party to an action, although he may have ceased to have any connection with the suit before the decree was passed, he would still come under clause (c) of section 244. That is how we understand the case of *Ramaswami Sastrulu v. Kameswaramma*(1). In that case it appeared that a suit was brought against two persons; subsequently the action was dismissed against one and a decree made against the other. In execution of this decree some property belonging to the defendant, who had been exonerated as above, was attached and sold. It was held by the Madras High Court that the party against whom the action had been dismissed was not entitled to maintain a suit for recovery of possession of the property, on the ground that the question fell within section 244. In support of this view, the learned Judges relied upon a previous case of their Court, *Sankaravadivammal v. Kumarasamy*(2), and a Bombay case, *Gouri v. Vigneshwar*(3). In this latter case it is suggested that as the words used in the section are “parties to the suit,” and not “parties to the decree,” it would not be correct, in principle, to restrict the operation

(1) (1899) I. L. R. 23 Mad. 361.

(2) (1885) I. L. R. 8 Mad. 473.

(3) (1892) I. L. R. 17 Bom. 49.

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of section 244, and in support of that view the case of *Chowdhry Wahed Ali v. Mussamut Jumaee*(1) was referred to, to which we shall presently advert.

The Allahabad High Court has taken a different view regarding the construction of the clause in question. In the case of *Jangi Nath v. Phundo*(2), in which the judgment of this Court in the case of *Kameshwar Pershad v. Run Bahadur Singh*(3) was approved of and followed, it was held that, when an action was dismissed against a defendant, he was thenceforth a stranger to the suit, and, if he afterwards came forward and raised an objection to the attachment of a certain property on the ground that it was his own, his objection would fall under sections 278 and 280 of the Code of Civil Procedure. And the remedy of the person against whom an adverse order was made, allowing or disallowing the claim, would be by a separate suit under section 283, and not by appeal under section 244. In *Mukarrab Husain v. Hurmat-un-nissa*(4), which was no doubt the decision of a single Judge, it was held that where several persons were sued in an action, and some were released from liability, they were not parties to the decree within the meaning of section 244, clause (c), and were therefore to be treated as strangers, and their objection to the attachment would come under section 278; and if their objection was disallowed, their only remedy was by a suit under section 283.

The principal case in this Court was decided in 1868 under the provisions of Act XXIII of 1861. Section 11 of that Act was, in material respects, identical in its terms with clause (c) of section 244, and enacted as follows:—

“Any question arising between the parties to the suit in which the decree was passed and relating to the execution of the decree shall be determined by order of the Court executing the decree and not by a separate suit.”

In the case of *Gour Kishore Chowdhry v. Mahomed Hassim Chowdhry*(5), Mr. Justice Loch, who delivered the judgment of the Court, said as follows:—“The words of the law are ‘parties

(1) (1872) 11 B. L. R. 149.

(3) (1886) I. L. R. 12 Calc. 458.

(2) (1888) I. L. R. 11 All. 74.

(4) (1895) I. L. R. 18 All. 52.

(5) (1868) 10 W. R. 191.

to the suit,' not 'parties to the decree,' and it cannot be denied that the plaintiff was a party to the defendant's suit. He was, however, released from the operation of that decree and must, we think, as regards the execution of that decree, be considered a stranger to the suit in which he had no further interest or concern. Looking upon him in that light, no objection can be taken to his present action, which is to have a declaration of his title with regard to those lands, which were declared to be his by the former decree, but which title he considers has been endangered by the act of the Ameen deputed to give possession to the defendant of the other lands decreed to him." In 1872 the Judicial Committee of the Privy Council dealing with the same section in the case of *Chowdhry Wahed Ali v. Mussamut Jumaoe* (2) held that, although they desired to give the widest meaning to the language of the section, yet what they had to see in the first place was that there was an existing decree which warranted any execution whatever against the respondent and they went on to add that "their Lordships cannot find after the incongruous proceedings above described that there exists any decree authorizing an execution against the respondent's estate; and consequently the question in the present suit is one not properly relating to the execution of a decree, but to a sale under orders which have not the support of any decree." These words in our opinion show distinctly what is to be borne in mind in considering the question whether the matter in dispute falls under section 244, clause (c) or whether it comes within section 278 of the Code of Civil Procedure. In the case of *Kameshwar Pershad v. Run Bahadur Singh* (3) two persons were sued for a certain debt. The decree in the first Court was against both; at the appellate stage it was modified and a personal decree for money was made against the Rani, one of the defendants, and the suit was dismissed against the other, Run Bahadur Singh. That decree was affirmed by the Judicial Committee of the Privy Council. Subsequently the plaintiff ascertained that under a certain *ekrarnama* executed by the Rani in favour of Run Bahadur Singh, he had made himself liable for her debts. The decree-holder thereupon proceeded to execute

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(2) (1886) I. L. R. 12 Cal. 458.

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the decree by attachment of the property in the hands of Run Bahadur Singh. The first Court held against the claim of the decree-holder, and on appeal to this Court it was contended that the question came within the terms of clause (c), section 244, and was one which the Court should have decided in those proceedings. With reference to that contention, the learned Judges, who dealt with the case, expressed themselves as follows:—

“Then as regards the contention that the present case comes within clause (c) of section 244, because the respondent Run Bahadur was a party to the suit, it seems to us that it is not well founded, because, although Run Bahadur was a party to the suit, no decree was passed against him. He was successful. The claim against him was that the property in his hands was liable as having been previously hypothecated. That was the only claim brought against him in that suit; and so far as that claim was concerned, the plaintiff's suit was dismissed, and therefore, although he was a party to the suit, still the question that has arisen is not a question relating to the execution of the decree, which was passed in the suit in favour of the plaintiff.”

It will be noticed that in the law as it stands at present, to the words “parties to the suit in which the decree was passed” in section 11 of Act XXIII of 1861, the words “or their representatives” have been added. And similarly after the words relating to the execution of the decree, the words “discharge or satisfaction of the decree or to the stay of execution thereof” have been added. But no change has been made in the principle and, therefore, what the Court has to consider is, as already mentioned, whether there is any dispute between the parties to the suit with respect to the decree passed therein which relates to its execution, discharge or satisfaction. That is practically the test applied by the Privy Council and by this Court in the case of *Kameshwar Pershad v. Run Bahadur Singh*(1) to determine whether the question at issue falls under section 244. Surely it cannot be contended that a person, who has ceased to be a party to the action before the decree was passed or who has been dismissed from the suit, and is then no more interested in the execution, discharge or satisfaction of the decree, should still be

(1) (1886) I. L. R. 12 Calc. 458.

considered subject to clause (c), section 244. What we have to see is, as has been conceded by the learned pleaders on both sides, whether the present appellants were in any way affected by the consent decree in the mortgage suit.

We have already noticed the words by which the appellants were exempted from all liability in the action; and giving our careful consideration to the terms of the decree, we are of opinion that in substance it amounted to a dismissal of the action as against the minor defendants. In the compromise which was filed, it was alleged that the properties were the separate and self-acquired properties of the mortgagors, and it was stated that the minors were in no way liable for the decretal money. Their liability was by the terms of the settlement limited to heirship to the mortgagors—a contingency which had not arisen. So far as the action is concerned, they were in our opinion discharged; and that being so, it seems to us that they were not parties to the suit within the meaning of section 244, clause (c), and that therefore no appeal lies to this Court from the order of the Subordinate Judge. We accordingly dismiss the appeal with costs.

M. M. B.

*Appeal dismissed.*

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# GOLAM AHAD CHOWDHRY

v.

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*Sale—Civil Procedure Code (Act XIV of 1882) ss. 244 and 311—Fraud—  
 Execution proceedings—Partition—Mortgage.*

After a sale has been confirmed, an application to set it aside for fraud is maintainable under s. 244 of the Civil Procedure Code.

*Malkarjun v. Narhari* (1) explained.

A co-sharer, who has obtained a portion of the mortgaged properties on a partition after the execution of a mortgage bond by the other co-sharers hypothecating their undivided shares in the said properties, and who has been made a party to the mortgage suit, is a necessary party to the execution proceedings.

The sale of his share of the property, held in execution of a decree obtained in his presence upon the mortgage bond, is not a nullity, although he was not made a party to the execution proceedings; but can be set aside in a proceeding properly set on foot for that purpose.

*Ram Chandra Mukerjee v. Ranjit Singh* (2) referred to.

THE petitioner, Golam Ahad Chowdhry (defendant No. 5), appealed to the High Court.

This appeal arose out of an application to set aside a sale by one Golam Ahad Chowdhry under ss. 244-311 of the Civil Procedure Code.

The petitioner alleged that the decree-holders in the execution case No. 81 of 1895 caused the sale of his properties to be clandestinely held without publication of any sale proclamation; that the decree in execution of which the sale took place was not made absolute under the provisions of the Transfer of Property Act and the execution proceedings were illegal; that the decree-holders in collusion with the serving peon caused the

\* Appeal from Order No. 289 of 1900, against the order of Babu Chandra Kanta Roy, Subordinate Judge of Backergunge, dated the 12th of May 1900.

(1) (1900) I. L. R. 25 Bom. 337.

(2) (1899) I. L. R. 27 Calc. 242.



notices to be concealed and without service in due manner fraudulently brought to sale the properties of the judgment-debtors worth not less than Rs. 50,000 and themselves purchased the same for Rs. 7,332; that by the said execution sale no property could be sold other than what fell into the share of the original debtor upon partition of the right which the original debtor had in the mortgaged properties and which was divided amongst the co-sharers by an *ekrarnama* before the institution of the mortgage suit by the plaintiffs.

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It appeared that two persons, Nurunissa Khatum and Momtazuddin Mahommed Chowdhry, executed a mortgage bond in favour of one Judhister Shaha and others on the 20th Sravan 1287 B.S., whereby Nurunissa Khatum, who was interested to the extent of 1 anna and 5 gandas, as one of the several co-sharers in between 600 and 700 parcels of land, mortgaged her undivided interest therein, her co-obligor joining in the bond on his personal security. Subsequently by an *ekrar* the co-sharers partitioned the property, and under the partition the petitioner became exclusively entitled to a large number of the parcels affected by the mortgage. In the year 1887 the mortgagees brought a suit upon the said mortgage bond against the mortgagors as well as the remaining co-sharers in the property. The petitioner was made the fifth defendant in the suit. The plaintiffs in the plaint alleged that a partition had been made of the mortgaged properties between Nurunissa Khatum, defendant No. 1, and the defendants Nos. 3 to 7, by virtue of an *ekrar* which they claimed to be invalid, and asked for a mortgage decree in the terms provided for in the Transfer of Property Act, but did not ask for any relief specifically in respect of the *ekrar*.

On the 5th February 1887, the Court passed a decree in the terms prayed for, and on the 23rd May 1888, the decree was made absolute. This decree was executed against the defendants Nos. 1 and 2 or their representatives only, without making the petitioner, defendant No. 5, a party to any of the proceedings. On the 25th November 1895, the mortgaged properties, with one or two exceptions, were sold and were purchased by the decree-holders, the sale being confirmed on the 20th January 1900. Subsequently another of the mortgaged properties was sold in

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execution of the decree and was purchased by the decree-holders. After obtaining a sale certificate in respect of this property purchased at the second sale, the decree-holders executed a conveyance on the 29th November 1897 to one Sorwar Jan of all the properties purchased by them at the above-mentioned sales, and they also assigned the decrees to Messrs. Garth and Weatherall, as trustees for the said Sorwar Jan. On the 22nd January 1900, two days after the confirmation of the sale which took place on the 25th November 1895, the present application was made by defendant No. 5 for setting aside the said sale.

The learned Subordinate Judge rejected the application without dealing with the question of the validity of the sale or disposing of the charges of fraud brought by the applicant against the decree-holders, but at the same time declared that the sale must be ineffectual in affecting the petitioner's right, if he had any.

*Dr. Ashutosh Mookerjee and Babu Surendra Nath Guha* for the appellant.

*Mr. J. T. Woodroffe (Advocate-General) and Babu Dwarka Nath Chuckerbutty* for the respondents.

**HILL AND BRETT JJ.** This appeal is against an order of the Subordinate Judge of Barisal, dated the 12th May 1900, refusing, on the application of the appellant, to set aside a sale held in execution of a decree.

The application was made under the following circumstances, so far as we have been able, from the somewhat scanty materials at our disposal, to ascertain them. On the 20th Srabun 1287, two persons, Nurunissa Khatum and Momtasuddin Chowdhry, who may conveniently be referred to as the mortgagors, executed a bond to the respondents, whereby the former, who was interested to the extent of 1 anna 5 gandas, as one of several co-sharers in between 600 and 700 parcels of land, mortgaged her undivided interest therein to secure the repayment of a sum of Rs. 11,000, her co-obligor joining in the bond on his personal security. Subsequently by an *ekrar*, the date of which does not appear, the co-sharers partitioned the property, and under the partition the

appellant became exclusively entitled to a large number of the parcels affected by the mortgage.

In the year 1887, the mortgagees sued in the Court of the Subordinate Judge of Barisal for the enforcement of their mortgage, making the mortgagors, as well as the remaining co-sharers in the property, defendants to the suit. The present appellant was the fifth in the array of defendants. In the sixth paragraph of the plaint, the following passage occurs:—"After the execution of the mortgage, the defendants Nos. 3 to 7 and the defendant No. 1 having executed an *ekrar*, which it was not within their power to do, the defendants Nos. 3 to 7 have made a division of and taken the mortgaged properties. As this is invalid, the defendants Nos. 3 to 7 have been made parties, so that the suit may be tried in their presence." The plaint concludes with the usual prayers for a decree for the amount claimed; for a declaration that the properties subject to the mortgage were liable for the amount decreed; and for realization of the decretal amount by sale of the mortgaged properties as well as from the mortgagors personally. No relief was asked for specifically in respect of the *ekrar*.

The suit was not defended by the "co-sharer" defendants, and on the 5th February 1887, the Court made its decree substantially in the terms of the prayers contained in the plaint. On the 23rd May 1888, this decree was made absolute. There were afterwards numerous applications for execution, to which it is unnecessary to refer more particularly, but on the 25th November 1895, the mortgaged properties, with one or two exceptions, were brought to sale on the application of the decree-holders in execution of their decree, and were purchased by them. The sale was not, however, then confirmed. In the following year a further application for sale was made, and another of the mortgaged properties was brought to sale and was also purchased by the decree-holders. Then we are informed that on the 23rd November 1897 the decree-holders assigned their decree to two gentlemen, Messrs. Garth and Weatherall, as trustees for a person named Sorwar Jan, and on the same date executed a conveyance to Sorwar Jan himself of all the properties purchased by them at the above-mentioned sales. In respect of the property purchased at the second sale, a sale certificate had then been issued. But the sale of the properties comprised in the earlier sale had not up to the date of the conveyance to Sorwar Jan

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been confirmed, and the decree-holders accordingly covenanted with him that, on his paying the necessary expenses, they would take the steps requisite for the purpose of procuring sale certificates in respect of these properties. This, however, was not done until the 20th January 1900. All the proceedings referred to above were prosecuted by the decree-holders as against Momtazuddin Chowdhry and Nurunissa Khatum, the mortgagors, and after the death of the latter, as against her representatives; neither the appellant nor any of the remaining co-sharers in the mortgaged properties having received notice of them, or been made parties to them, and it is on this ground mainly that the appellant now calls in question the validity of the sale of the 25th November 1895. His application to the Subordinate Judge, which was filed on the 22nd January 1900, two days after the confirmation of the sale, was preferred under the provisions of sections 244 and 311 of the Code of Civil Procedure, his case, stated generally, being that the suit on the mortgage and all the subsequent proceedings in execution were fraudulently kept from his knowledge by the decree-holders; that it was only some few days prior to the date of his application that he came to know either of the suit or the sale in execution, and that the sale was invalid in consequence of his not having been made a party to the proceedings in execution. He also sought to impugn the sale on the ground that the decree-holders were not entitled to bring to sale any of the properties save those which fell to the lot of their mortgagor under the partition effected by the *ekrar*. The learned Subordinate Judge rejected the application without, however, dealing with the question of the validity of the sale or disposing of the charges of fraud brought by the applicant against the decree-holders. At the same time, he declared, on the authority of *Ram Chandra Mukerjee v. Ranjit Singh*(1), that the sale could not affect the right of the appellant in any way, as, notwithstanding the partition, he had not been made a party to any of the execution proceedings. Both parties appealed to this Court against this order. The appeal of the decree-holders has been dismissed, and we are not now concerned with it; that of the fifth defendant, which is now before us, raises the question, whether, in view of the circumstances set forth above, the sale of the 25th

(1) (1899) I. L. R. 27 Cal. 242.

November 1895 can stand good. It is conceded that the Subordinate Judge had not authority, without setting aside the sale, to make the declaration contained in his order, the practical effect of which is to render the sale nugatory in so far as the property allotted to the appellant on the partition is concerned, but it is contended that the sale is bad, and ought to be vacated, because the appellant was not made a party to the proceedings in execution under which his property was sold, and further, that if this is not so, the sale ought to have been set aside on the other grounds set forth in the appellant's petition.

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Before considering these questions, it may be well to refer to an objection raised by the respondent's learned counsel to the competency of the application made by the appellant to the Lower Court. It was said that the sale having been confirmed, the appellant's remedy was not by an application under section 244 or 311 of the Code, but by suit, and reference was made in support of this contention to *Malkarjun v. Narhari*(1). Their Lordships there, no doubt, indicate a suit as a means by which the sale in execution then in question might have been set aside. They say: "It may be that the plaintiffs could unite a suit to set aside with one to redeem, and that the defendants' anticipatory plea of misjoinder would, if tried, have been overruled," and again later on in their judgment: "But if the sale is a reality at all, it is a reality defeasible only in the way pointed out by law, and it seems to their Lordships that the case must fall either within section 311 of the Code or within article 12 (a) of the Limitation Act of 1877." Their Lordships were, however, dealing with a sale which was impeachable on the ground solely of an irregularity, and in such a case, no doubt, the remedy of the person whose property had been sold would, prior to confirmation, be by an application under section 311, or after confirmation by a suit governed by article 12 (a) of the Limitation Act. But there is nothing in the judgment to indicate that their Lordships had in contemplation the case of a party to the suit seeking after confirmation to set aside a sale on the ground of fraud, or to suggest that in the view of their Lordships he would be precluded from applying to the Court under the provisions of section 244 of the Code. It is,

(1) (1900) I. L. R. 25 Bom. 337.

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moreover, to be borne in mind that the question whether the appellant in the present case is still entitled to apply under section 311 has yet to be decided.

There was another objection taken by the learned counsel to the effect that the proper parties were not before the Court, inasmuch as Messrs. Garth and Weatherall, who had, by assignment of the decree to them, become the decree-holders, were omitted, while Sorwar Jan, as the purchaser of the properties from the auction-purchasers, was also a necessary party. It was also said that some of the co-sharers in the property, who ought to have been joined, had also been omitted. We think, however, that the objection is not one to which we can give effect, for, in the first place, the respondents appeared on the record in the character both of decree-holders and auction-purchasers; nor is it suggested that the appellant was aware, at the time when he made his application, either of the assignment of the decree to Messrs. Garth and Weatherall, or of the sale to Sorwar Jan, and with respect to the so-called co-sharers, some of these persons have, we are informed, in point of fact been made parties. But assuming, which may be doubtful, that a co-sharer cannot properly question an execution sale without bringing in all his co-sharers in the property sold, the appellant is the exclusive owner of the property affected by the present application, while the other persons interested in the properties sold have applied, as well as the applicant, to have the sale set aside, and their applications both in the Lower Court and here, have been treated virtually, as if they had been consolidated. The objection, moreover, so far as it appears, was not taken in the Court below, where any defect of parties, if such existed, might have been rectified.

Turning now to the main question. It was contended on behalf of the appellant that the Court below having found that certain of the properties sold had been allotted exclusively to the appellant under the partition, and that he had not been made a party to any of the proceedings in execution, it ought to have set aside the sale. The contention of the respondents, on the other hand, was that the effect of the decree in the mortgage suit to which the appellant was a party, was either to establish that there never had been a partition, or, if there had been, then that it was ineffectual as

against the respondents; that the decree relegated the parties to the position which they occupied when the mortgage was executed, and that the appellant, therefore, being a stranger to the mortgage, was not entitled to redeem or to assert any interest in the property sold, which was the property subject to the mortgage. This, however, we think is hardly a true representation of the effect of the decree, or of the relations of the parties. We have not the judgment of the Court in the mortgage suit before us, and we are unable, therefore, to say whether there was any reference in it to the partition. But looking to the plaint in the suit and the decree, we think that what was sought by the former was a declaration that the mortgagees were entitled, notwithstanding the partition, to have recourse to the undivided share of their mortgagor in all the properties which had been mortgaged to them. They did not seek, and, so far as the decree discloses, they did not obtain, a declaration that the partition was invalid, and if in point of fact the partition had taken place, it is not easy to perceive by what authority the Court could in that suit have made such a declaration, unless it had been established that the partition had been brought about in fraud of the mortgagees. But the fact of the partition was admitted in the plaint, and it was not suggested that it was in any way affected by fraud; all that was asserted with regard to it was that it was not within the power of the co-sharers to effect it—a proposition which was untenable. The fact of the partition being admitted, the only question between the appellant and the mortgagees, had the former defended the suit, would have been whether the mortgagees could resort to the properties which, on the partition, had been allotted to him. He might then most probably have successfully contended that they could not do so. But by failing to contest the suit, he did not lose the exclusive interest in those properties, which resulted from the partition. The only consequence which followed was that a decree went against him declaring the right of the mortgagees to proceed against property which had become his to the extent of the interest therein originally belonging to their mortgagor, or, to put it otherwise, that on the partition he took the properties allotted exclusively to him, subject, to the extent of the interest previously belonging to the mortgagor, to

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the mortgage. The effect of the partition was to extinguish as between the mortgagor and the appellant the interest of the former in the property allotted to the latter; so that the position of the appellant thereafter bore a close analogy to that of a purchaser of the equity of redemption in mortgaged property, who, by the purchase, becomes the owner of the property, but subject to the mortgage, and the decree did nothing to alter this state of things. It may be, as was contended by the learned Advocate-General, that the appellant has now no right of redemption; but assuming that to be so, it is merely a consequence of the decree having been made absolute, not a result flowing from the original decree, or decree *nisi*, in the suit. He might, as an owner of the property, have come in at any time and redeemed the mortgage, until his right of redemption was extinguished by the order absolute for sale. But the mere extinction of the right of redemption does not, we think, affect the question now before us, for a mortgagor whose property has been sold under a decree absolute on the mortgage, may come in and question the validity of the sale, although his right to redeem may have been long since extinguished by the decree, and, if he may do so, the person to whom he has transferred his interest may, we think, do the same.

The next question, therefore, appears to be whether, as the owner of the property sold, the appellant ought, under the circumstances of the present case, to have been made a party to the proceedings subsequent to the order absolute for sale, and if that question is to be answered in the affirmative, what is the effect of his not having been made a party? It was contended for the appellant, on the authority of *Ram Chandra Mukerjee v. Ranjit Singh*(1) that he was a necessary party, and that the effect of his not having been made a party was to invalidate the sale. The respondent's answer was that he was not a necessary party, it being sufficient that the mortgagors were before the Court, and that, even if he was a necessary party, the omission to join him did not affect the validity of the sale. In support of the latter position the learned Advocate-General relied upon *Malkarjun v. Narhari*(2), which he, moreover, contended, had in effect overruled *Ram Chandra Mukerjee v. Ranjit Singh*(1).

(1) (1899) I. L. R. 27 Calc. 242.

(2) (1900) I. L. R. 25 Bom. 337.



In the latter case the plaintiff sued for a declaration of his title to and possession of certain immoveable property in the character either of *shebait* of an idol or as the rightful heir of one Kumar Ram Chand and his widow Rani Annadamoye. The property in question, it was said, had been dedicated to an idol by Kumar Ram Chand, but it was held in this Court that the dedication was fictitious. The plaintiff was, however, held to be the lawful heir of Kumar Ram Chand and of Rani Annadamoye. The property had come after the death of Kumar Ram Chand and of a lady, who had held it for her maintenance, into the possession of Rani Annadamoye as the widow of Kumar Ram Chand. After her death it was brought to sale in execution of a decree obtained against Rani Annadamoye, after the substitution for her in the execution proceedings of one Hari Singh, the son of Sri Narain Singh, the latter of whom claimed to be the adopted son of Kumar Ram Chand. The adoption, however, was invalid, and Hari Singh was not the heir, either of Rani Annadamoye or of her husband. The property was purchased at the sale in execution by the defendant. In these circumstances it was held that the sale could not affect the plaintiff's rights, and the Court accordingly gave him a decree for possession. In the course of their judgment the learned Judges say:—"It was urged for the respondent by way of cross-objection that the Court below was wrong in holding that the proceedings in execution were rightly taken. We think this contention of the respondent is valid. The property not being *debutter*, Sri Narain Singh not being the validly-adopted son of Kumar Ram Chand, and the plaintiff being by the Hindu law of the Benares school, which governs the parties, the heir of Kumar Ram Chand and of Rani Annadamoye, any proceedings in execution in the absence of the plaintiff and on the substitution of Sri Narain Singh or his son as the legal representatives of Rani Annadamoye must be ineffectual as affecting the plaintiff's right." It was on this passage that reliance was placed for the appellant, and the principle upon which it proceeds, if applicable to a case, where the question is as to the due representation of the estate of a deceased person, would certainly seem to apply equally to a case where the owner of the property sold, has not been made a party to the proceedings in execution.

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In *Malkarjun v. Narhari* (1) the suit was for the redemption of mortgage and was instituted in the year 1887 by the heirs of the mortgagor. The defence was that in a suit instituted against the mortgagor by a creditor a decree was obtained, in execution of which the mortgagor's interest in the mortgaged property was brought to sale and purchased by the defendant (the mortgagee) in 1880, who afterwards in the same year obtained possession and had ever since continued in possession. The plaint was silent about the execution sale, but in the written statement it was suggested that the plaintiffs might possibly contend that the sale was illegal, because it took place without the plaintiffs being joined in the certificate as heirs. It was, however, pleaded that the claim for redemption could not be maintained, unless a suit were brought to set aside the execution sale. Their Lordships gave effect to this plea, holding that, although the omission to serve notice of the proceeding in execution on the legal representative of the judgment-debtor was a serious irregularity, sufficient by itself to entitle the plaintiffs to vacate the sale, and although the Court executing the decree had made a "sad mistake" as to the person, whom it treated as the representative of the judgment-debtor, the sale nevertheless was not held without jurisdiction, and was therefore valid and binding upon the plaintiffs who, without having it set aside, could not redeem the property.

It may perhaps be difficult to reconcile this decision with the case of *Ram Chandra Mukerjee v. Ranjit Singh* (2). But, at all events, it can aid the respondents only in so far as it shows that the sale now in question was not, in consequence of the omission to join the appellant in the proceedings in execution, a nullity. The Subordinate Judge has no doubt treated the sale *quâ* the appellant's interests in the property, as a nullity and, in doing so, we think, on the authority of *Malkarjun v. Narhari* (1), he was wrong. But that case did not, as need hardly be pointed out, decide that, because a sale is not a nullity, it cannot be set aside in a proceeding properly set on foot for that purpose. Here the appellant has applied in the manner prescribed by law to have the sale set aside, and his application was founded not only

(1) (1900) I. L. R. 25 Bom. 337.

(2) (1899) I. L. R. 27 Calc. 242.

on the provisions of section 311, but on those also of section 244 of the Code. Ordinarily, no doubt, the provisions of the former section can be availed of only when the sale has not been confirmed, and within the period of thirty days from the date of sale which, it is true, in the present instance, had expired long before the appellant's application was made. But if the right of the appellant to apply under the section was concealed from him by the fraud of the respondents, he would, by the operation of section 18 of the Limitation Act and notwithstanding the confirmation of the sale, have thirty days within which to make his application from the date on which the fraud first became known to him. In his petition to the Lower Court he plainly enough sets up a case against the respondents of fraudulent concealment, and alleges that he had in consequence no knowledge either of the original suit or of the auction sale, until five days before the date on which he presented his application. If this had been made out, he would have been entitled to the benefit of the section, assuming of course the fulfilment of the conditions, which the section prescribes. At all events he would have been entitled to come in and question the sale on the ground of the irregularity complained of, and to which, *inter alia*, it may be added he attributes in his petition a very serious loss on the sale of the property. In consequence, however, of the manner in which the case has been dealt with in the Court below, none of these questions has been gone into, and the materials are not before us to enable us to express any opinion upon them. There are also, in addition to the irregularity, considered merely as such, in the conduct of the sale proceedings, the allegations of fraud contained in the petition upon which the appellant founded his case under section 244 of the Code, which likewise have not been dealt with by the Lower Court. These are independent of the other branch of the case and would, if established, have entitled the appellant to have the sale set aside. He has not, however, as would appear in consequence of the view taken by the Lower Court which, though favourable to him, was erroneous, had an opportunity of placing his case before it, and we think that such an opportunity should now be afforded him. We accordingly set aside the order appealed against and remand the case to the Court below for retrial. The costs in this Court will abide the result.

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CHUNDEA  
SHAH.  
Since the above was written, we have been asked by the learned Advocate-General to consider the effect of *Nett Lall Sahoo v. Sheikh Kareem Bux*(1), which was not cited at the hearing, upon the position of the appellant. We have done so, but we do not think there is anything in the case, which should lead us to modify our judgment.

(1) (1896) I. L. R. 23 Calc. 686.

S. C. G.

*Appeal allowed. Case remanded.*

## FULL BENCH.

KRISHNA KAMINI

v.

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June 12, 13,  
16, 17;  
July 21.

*Jurisdiction—"Parties concerned in such dispute," meaning of—Addition of parties during proceedings, effect of—Fresh proceedings, if necessary—Omission to add necessary parties—Dispute as to separate plots of land—Separate proceedings, if necessary—Criminal Procedure; Code (Act V of 1898), s. 145.*

Proceedings under s. 145 of the Criminal Procedure Code are not without jurisdiction because the Magistrate on information before him has made parties thereto only those actually in dispute and likely to cause a breach of the peace, although it is brought to his notice that another party is interested in the subject-matter of the dispute, nor is the Magistrate bound to stay such proceedings.

The words "parties concerned in such dispute" are intended to indicate all persons claiming to be in possession at the time of the initial orders under cl. (1), s. 145 of the Code.

A claim merely to a right to possession, as distinguished from a claim to be in possession, would be outside the scope of the inquiry.

Where there has been an addition of a party after the initiation of the proceedings, there is no necessity for fresh proceedings, if the party added was concerned originally in the dispute, which is the foundation of the proceedings.

Up to the time the inquiry begins, parties may be added. If they are added after, it is an irregularity, but it is not necessary to initiate fresh proceedings, although evidence previously taken ought, if the parties added require it, to be again taken in their presence.

Proceedings under s. 145 are not without jurisdiction, because some person claiming possession in some way of the lands or a portion of the lands in dispute has not been made a party, he not being one of the parties in the dispute likely to cause a breach of the peace, so far as appeared to the Magistrate; such person not having appeared and raised any objection.

\* Full Bench Reference in Criminal Revision No. 730 and No. 834 of 1901.

Full Bench: Sir Henry T. Prinsep (Chief Justice, offg.), Mr. Justice Banerjee, Mr. Justice Hill, Mr. Justice Brett, Mr. Justice Henderson.

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Proceedings under s. 145 are not without jurisdiction because some of the parties are concerned only with possession of a portion of the lands in dispute.

*Protap Narain Singh v. Rajendra Narain Singh* (1) declared obsolete.

RULES were obtained in the two cases No. 730 of 1901 and No. 834 of 1901.

The facts of case No. 730 of 1901 were as follows:—

In March 1899 the Subdivisional Officer of Tangail instituted proceedings under s. 145 of the Code of Criminal Procedure, with regard to *chur* Bilsa, making Brojendro Kumar Roy Chowdhry the first party and Hari Dass Sanyal the second party, and on the 21st October 1899 an order was passed maintaining Brojendro Kumar Roy Chowdhury in possession of the said *chur*. Subsequently the said officer, on a report submitted by the police, took proceedings to keep the peace, and in January 1900 bound down some of the servants of the disputing parties under s. 107 of the Code. On a further report of the police, the said officer on the 7th February 1900 instituted proceedings under s. 145 of the Code in respect of the said *chur*, making Abdul Jubbar Chowdhury and others the first party and Brojendro Kumar Roy Chowdhry the second party.

Parties 1 to 8 and 19 of the first party in their written statements alleged that they had different shares in certain of the lands, that they claimed the *chur* lands under a zemindari right as well as that of adverse possession, and one of the parties claimed some specified rent-free *brohmutter* lands. Certain others of the first party claimed portions only of the disputed lands as rent-free *brohmutter*.

The second party alleged that the order passed in his favour on the 21st October 1899 was a bar to the institution of the present proceedings, and that his possession should be maintained; that owing to the order under s. 107 of the Code these proceedings could not be instituted without fresh materials; that he claimed the lands in dispute partly as rent-free *brohmutter* and partly under certain decrees of the Civil Court.

(1) (1896) I. L. R. 24 Cal. 55.

On the 29th October, the first party by petition urged that, as each of the second party claimed separate parcels of the land and had set up different rights and titles, there ought not to be one proceeding in respect of all the disputed lands, and also that the tenants on the *chur* lands should be made parties. The petition was ordered to be filed.

Ayeshar Khanum, one of the first party, died, and her heirs were substituted in the said proceedings. Brojendro Kumar Roy Chowdhry also died, and his heirs, the petitioners, Krishna Kamini and others, were substituted as parties to the proceedings. The Subdivisional Officer, after taking evidence on behalf of both parties, on the 18th February 1902 ordered the property in dispute to be attached under s. 146 of the Code.

The petitioners applied to the High Court and obtained a Rule on the grounds stated below in case No. 730 in the order of reference.

The facts of case No. 834 of 1901 were as follows:—

In this case, on a police-report dated the 2nd February 1901, the Deputy Magistrate of Khulna on the 8th idem took proceedings under s. 145 of the Code of Criminal Procedure in regard to certain land between some of the petitioners and some of the opposite party. Objection was made by one of the parties that the zemindar, under whom he and his co-sharers claimed, should have been made a party; that they were in possession of different portions of the disputed lands separately, and also that certain other zemindars should be joined.

The other party also urged that their landlord should be made a party. On the 7th March the Magistrate drew up fresh proceedings, adding several persons to each side.

One set of their zemindars objected to being made parties on the ground that they were not going to commit any breach of the peace, and that their tenants, who were already parties to the proceedings, were in actual possession of the lands in dispute.

On the 28th June the Magistrate passed an order maintaining the opposite party in possession. The petitioners applied to the High Court and obtained a Rule on the grounds stated in the order of reference below in case No. 834.

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Upon the hearing of the Rules the Criminal Appellate Bench of the High Court (PRINSEP and STEPHEN JJ.), doubting the correctness of the decisions on which the Rules were obtained, made a reference to a Full Bench on the 21st April 1902.

The order of reference was as follows:—

CASE No. 730.

On a police report in December 1899 the Magistrate took proceedings to keep the peace and bound down some servants of each of the disputing parties, Brojendro Kumar Roy Chowdhry and Abdul Jubbar, under s. 107 of the Criminal Procedure Code.

On a further report of the police the Magistrate instituted proceedings under s. 145, making parties thereto Brojendro Kumar Roy Chowdhry on the one side and Abdul Jubbar and others on the other side. Some of the latter claimed a portion of the lands in dispute as belonging to their estate and others claimed specific plots as their rent-free *brohmutter* lands, but all resisted the claim made by the opposite party, and it may be observed that objection was taken on the ground that separate proceedings should have been held in respect of each of these plots. On the 25th February one of these persons, Ayesha Khanum, having died, the Magistrate substituted her heirs in her place. In the course of the proceedings Brojendro Kumar Roy Chowdhry has also died, and his heirs, the petitioners, who have obtained a Rule, were placed on the record in his place.

Finally, the Magistrate under s. 146 attached the lands in dispute.

A Rule has been granted on three grounds:—

- I.—That the Magistrate has no authority in the course of the proceedings to add parties.
- II.—That necessary parties, the tenants claiming to occupy different portions of the *chur* lands in dispute, and the party, who was one of the parties in the earlier proceedings under s. 145 between the petitioners on the one hand and that other party on the other, have not been included in this proceeding.
- III.—That the order under s. 146 is not an order which is authorized by the facts found.

In reference to the second ground it should be explained that, in a proceeding relating to a dispute regarding the *chur* lands now in dispute between Brojendro Kumar Roy Chowdhry (who is now deceased and is represented by the petitioners and his heirs or legal representatives) and Hari Das, who is no party to these proceedings, the Magistrate on 21st October 1899 passed an order under s. 145 in favour of the former. One of the objections now taken is that Hari Das should have been made a party to this case under s. 145, although he is bound by the previous order. But the main objection is that all the tenants occupying portions of the land in dispute are not parties to the present proceedings. No objection is made on this account by any of these persons. It is made by one of the parties who has an



order under s. 146 against him. It may be stated also that the lands in dispute in the two cases are from their nature not exactly the same, though they are practically so. They are a *clur* which naturally varies in its area from the action of the river, which has formed it. The lands in the present proceedings are not therefore exactly the same as those in the former proceedings.

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## CASE No. 834.

In this case, on a police-report of 2nd February 1901, the Magistrate on 8th idem took proceedings under s. 145 in regard to 51 bighas of land as between certain parties.

On objections taken in the written statements put in that the zemindars under whom some of the parties held, had not been made parties, although they were concerned in the dispute, that is, in the order which might be ultimately passed, the Magistrate on 7th March drew up fresh proceedings, making other persons parties to this case. Amongst these parties were the two sets of zemindars, who claimed each to be in possession through others of the lands in dispute. These persons, it may be observed, were made parties on a second report of the police, showing that they were concerned in the subject-matter of dispute because they laid claim to the whole or to portions of the lands, the actual possession of which was under determination.

One set of these zemindars, who, it may be observed, have obtained the Rule now under consideration, objected to being made parties on the ground that they were not going to break the peace, and also that their tenants, who were already parties to the proceedings under s. 145, were in actual possession of the lands in dispute.

The Magistrate on 28th June passed an order against them and in favour of the first party.

A Rule has been obtained on the following grounds :—

- I.—That there was no information properly so called before the Magistrate upon the date of the institution of the proceedings that there was an imminent breach of the peace.
- II.—That the dispute being between different persons claiming different parcels of land under different rights, one and the same proceeding could not be instituted.
- III.—That the final order of the Magistrate is to a great extent, if not mainly, based upon a local investigation which, for the purposes he had in view, he was not competent to make.

In regard to the first ground, we may observe that the Magistrate recites, as the grounds upon which he proceeds, the police-report of the 2nd February upon which he acted in his first proceedings, and this report shows that a breach of the peace was likely to take place between the parties to those proceedings. In the subsequent police-report it is stated that others who were afterwards made parties to the fresh proceedings should be made parties, but it is not stated that they were likely to cause a breach of the peace.

We desire to refer these cases to a Full Bench on the first two grounds in each case, because we do not agree with the reported cases on which the objections so

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taken, are founded. On the third ground in each case we feel no such difficulty. The points on which we desire an opinion from a Full Bench are of the highest importance in dealing with cases of this description, and it is therefore very desirable that the law in these respects should be settled.

The points raised on which we desire to obtain the opinion of a Full Bench, shortly stated, relate to the consequence of defect of parties in a proceeding under Chapter XII of the Code of Criminal Procedure and also to what may be described as multifariousness.

On the first point it is necessary to determine the meaning of the words "parties concerned in such dispute" in s. 145 (1), whom the Magistrate by an order in writing initiating the proceedings is to require "to attend his Court and put in written statements of their respective claims as regards the fact of actual possession of the subject of dispute."

In *Ram Chandra Das v. Monohur Roy*(1) it was held that "the words 'parties concerned' do not necessarily mean only the persons who are disputing. They include persons, who are interested in the dispute—persons who claim a right to the property, which is in dispute." This interpretation has been generally accepted in subsequent cases, and this has led to the result, which we will shortly describe. Amongst these cases may be mentioned *Ganesh Jalil v. Ayub Chaudhuri*(2) to the judgment in which one of the Judges of this Bench was a party, but on re-consideration he is of opinion that the judgment delivered went too far. The case of *Ram Chandra Das v. Monohur Roy*(1) was referred for the consideration of a Full Bench in *Protap Narain Singh v. Rajendra Narain Singh*(3), two of the referring Judges expressing a dissent from it. The Full Bench, however, abstained from expressing any opinion on it, and only held that "there is no power in the course of the proceedings to add parties," and that "if in the course of the proceedings it appears to the Magistrate that it is absolutely necessary that other parties should be required to attend and he is satisfied that they are concerned in the dispute, the only course open to him is, if he is empowered on that behalf and he is satisfied that danger of breach of the peace still exists, to initiate a fresh proceeding." This decision still left open the question which the learned Judges who made the reference desired to have determined, namely, whether the words "the parties concerned in the dispute" bore the meaning attached to them in *Ram Chandra Das v. Monohur Roy*(1), so that an omission to include in the original proceedings persons interested in the subject-matter of the dispute made the order bad for want of jurisdiction, though no breach of the peace by such persons was apprehended.

We are inclined to dissent from the interpretation of those words expressed in *Ram Chandra Das v. Monohur Roy*(1).

Section 145 of the Code of Criminal Procedure declares that, when a Magistrate as therein described is satisfied from a police-report or other information that a

(1) (1893) I. L. R. 21 Calc. 29.

(2) (1900) 4 C. W. N. 753.

(3) (1896) I. L. R. 24 Calc. 55.

dispute likely to cause a breach of the peace exists concerning any land, etc., he shall make an order in writing, stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend his Court, etc. It seems to us that 'the parties concerned in such dispute' means 'not the parties concerned in the dispute because they are interested in possession of the particular land, etc., but the parties concerned in the dispute because they are likely to cause a breach of the peace. The duty of the Magistrate under the section is merely to prevent a breach of the peace, and this he is to do by deciding the disputed possession as between the parties likely to cause such a breach and as between them alone. His final order is, moreover, only of temporary effect, declaring one of those parties to be entitled to possession until evicted in due course of law and forbidding all disturbance of such possession, until such eviction. We understand that this order can properly have effect only as between the disputing parties, that is, the parties to the proceeding in which it was made; *Gopal Burnaswar*(1), *Nobo Kishore Chuckerbutty*(2), *Queen-Empress v. Khuppayyar*(3). The disturbance of possession so declared seems to us to be disturbance by the party against whom the order is made, whose dispute has caused an apprehension of a breach of the peace and has called for the Magistrate's interference. This appears from *Kunund Narain Bhoop*(4) and *Bechu Sheikh v. Deb Kumari Dasi*(5), in which it was held that notice of the proceedings, that is, service of the order in writing, should be only on those made parties to the proceeding and should not be of the nature of a general citation to all parties concerned in the matter so as to enable the Magistrate to make a final and binding order in regard to the actual possession of the land, etc., in dispute. If any third party claiming to be in possession of the land, etc., the subject of an order under s. 145, finds that it may injuriously affect his position, the law gives him more than one remedy; and s. 145 (5) gives him an opportunity of intervening in the course of proceedings under that section by showing that no such dispute as alleged between the parties which has led to these proceedings exists or has existed, for instance, by showing that the alleged dispute for possession does not exist because he is peacefully in possession of the land, etc., the subject of the alleged dispute.

No parties can be added to proceedings already taken, but if, in the course of those proceedings, the Magistrate finds that it is absolutely necessary that other parties should attend as being concerned in the dispute, and he is satisfied that danger of a breach of the peace still exists, he can initiate fresh proceedings. *Protap Narain Singh v. Rajendra Narain Singh*(6).

So in several reported cases, following *Ram Chandra Das v. Monohur Roy*(7), it has been held that all persons concerned in the dispute, that is, interested in the order for possession that may be passed in proceedings under s. 145, must be made

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- (1) (1869) 3 B. L. R. App. Cr. 13.
- (2) (1880) 7 C. L. R. 291.
- (3) (1894) 1. L. R. 18 Mad. 51.
- (4) (1878) 1. L. R. 4 Calc. 650.
- (5) (1893) 1. L. R. 21 Calc. 404.
- (6) (1896) 1. L. R. 24 Calc. 55.
- (7) (1893) 1. L. R. 21 Calc. 29.

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parties thereto; and that, if they are not made parties, the whole proceedings are bad for want of jurisdiction. Again, in *Laldhari Singh v. Sukdee Narain Singh*(1) it was held that, when the dispute is between two sets of zemindars and two sets of tenants, claiming each to be the tenants of one of these zemindars, an order declaring the possession of one of these zemindars was bad for want of jurisdiction, because the tenants were no parties to the proceedings. The objection in this case, we would point out, was not taken by any of the tenants, but by the zemindar, against whom the order was made, and it was allowed. *Anesh Mollah v. Ejaharuddi Mollah*(2) is a similar case. Here one of the two sets of zemindars was no party apparently because they had failed in a possessory suit regarding this same land. But persons who claimed to have been in possession under these zemindars were parties on the one side and the zemindars who had succeeded in the possessory suit on the other side together with their own tenants were also parties. The proceedings were quashed as without jurisdiction because the adverse zemindars were no parties, although they did not themselves raise this objection and although, so the report shows, these zemindars had failed to establish their possession in a possessory suit brought against them by the zemindars, who were parties to the proceedings under s. 145.

In the case of *Mangal Halder v. Naimuddi Fakir*(3) it has been laid down that "it is the duty of the Magistrate before he initiates proceedings under s. 145 of the Code of Criminal Procedure, not only to be satisfied that a dispute exists, but to ascertain so far as possible, who are the parties concerned in the dispute," and it was further stated that "it does not appear that the Magistrate in this case made any endeavour in that direction, and, on the face of the statements made on the written statements filed by both parties, the Magistrate ought not to have proceeded in the matter without bringing in the necessary parties to the proceedings." In this case it does not appear that these parties were stated to be concerned in the dispute in the police-report, on which the Magistrate took proceedings. This information appeared in the written statements which the parties were required to put in. It does not, moreover, appear that either of these persons, who had not been made parties, made any objection on this account. The objection was raised before the High Court on revision by the party, who had lost the case, and it was allowed. We are inclined to dissent from the opinion expressed that it is "the duty of the Magistrate to ascertain who are the parties concerned in the dispute" beyond what may appear from the police-report or other information on which he has acted. To require a Magistrate so to act would be to require him to ascertain who in any degree, whether as zemindars, tenure-holders, tenants or even as share-holders in the property in dispute, are likely to claim any possession in such property: in fact, to make an inquiry into title such as an attorney would make in the interests of his client. If the reported cases be accepted as correctly interpreting the law, any omission on the part of a Magistrate in respect of any person holding a small interest, even as tenant of a portion of the particular land or as a co-sharer with others on the record, would make his proceedings bad for want of jurisdiction.

(1) (1900) I. L. R. 27 Calc. 892.

(2) (1901) I. L. R. 28 Calc. 443.

(3) (1901) 6 C. W. No 101.

Few cases would escape from such criticism. In the next place, if it were incumbent on a Magistrate to make such an inquiry, a delay would be interposed which the law can never have contemplated. The Magistrate on materials before him might have reason to believe that a breach of the peace was impending, and, though he is invested by law with ample means for averting a disturbance by proceedings under s. 145, he would be restrained from so acting until he had held an inquiry of a somewhat intricate character to ascertain who in any degree might claim to have any right in the property in dispute. Meantime the breach of the peace, which it is the object of the law to enable him to prevent, would take place, possibly with bloodshed.

In our opinion the law imposes no such duty on a Magistrate. He satisfies the law when he acts on the police-report or other information before him by making parties to his proceedings under s. 145 those, who are shown to be actually in dispute.

We desire also to mention for consideration by the Full Bench the result of the case of *Protap Narain Singh v. Rajendra Narain Singh*(1), in which it was held that "if it appears to the Magistrate that it is absolutely necessary that other parties should be required to attend and he is satisfied that they are concerned in the dispute, the only course open to him is, if he be empowered in that behalf and he is satisfied that danger of a breach of the peace exists, to initiate a fresh proceeding." The learned Judges probably contemplated fresh proceedings on fresh materials, showing that then it was still likely that a breach of the peace would take place, and this was the view expressed in *Beni Singh v. Umrao Mahto*(2), which has already been mentioned, where it was held that fresh proceedings could not relate back and be a continuation of the former proceedings, but must be on a fresh police-report or other information. The case before the Full Bench was under the Code of 1882: the other case was under the present Code of 1898.

We have had recently before us a case showing the injustice which has been caused by this in consequence of the alteration of the law made by s. 145(4) proviso of the Code of 1898. A Rule has been granted to consider the matter, and it is still, we believe, *sub judice*. In that case the proceedings under s. 145 were between A and B. The Magistrate, however, thought proper to make fresh proceedings, in which C was also made a party, and in them he found that A had been wrongfully and forcibly dispossessed by B within two months of the date of the original proceedings; but by reason of the lapse of time consequent on the fresh proceedings, the Magistrate found himself unable to give A the order to which A was justly entitled. We mention this as another instance of the result of insisting that all persons interested in the subject-matter of the dispute must be made parties to proceedings under s. 145 as being concerned in the dispute.

The other point which we desire to refer to a Full Bench relates to the joinder in the same proceedings of several plots of land held separately by some of the parties, and it has been argued before us, on the principle adopted in some of the cases regarding parties, that this takes the case out of the Magistrate's jurisdiction, inasmuch as a case should be distinct and separate in respect to each person. See *Rajah Rameswar Persad Narain Singh v. Harbans Singh*(3), in

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(1) (1896) I. L. R. 24 Calc. 55.

(2) (1900) 5 C. W. N. 900.

(3) (1901) 6 C. W. N. 104.

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which an order under s. 145 was set aside as without jurisdiction because it was passed in favour of two persons, who disclaimed all interest in the subject-matter of the dispute, although the order was also passed in favour of two others who were parties to the proceedings and contested the case. The inconvenience of such a course is so obvious that it requires no comment. There are no reported cases that we are aware of in support of this contention, unless we may refer to *Sadar Ali v. Abdul Karim*(1). On the other hand, we may refer to *Azim Mollah v. Satoo Poramanick*(2), *Kutuhul Singh v. Uma Singh*(3), *Abhayessari Debi v. Shidhessari Debi*(4), *Iswar Chunder Chowdhry v. Kali Mohan Roy*(5).

The points on which we desire the opinion of the Full Bench therefore are—

Are proceedings held under s. 145 of the Code of Criminal Procedure bad for want of jurisdiction because the Magistrate on information before him has made parties to such proceedings only those who are actually in dispute and who are likely by such dispute to cause a breach of the peace, when in the course of the proceedings so taken it is brought to his notice that some other party is interested in the subject-matter of the dispute, that is, is likely to be affected by the order to be passed in respect of the possession of the land in dispute? Is the Magistrate bound to stay such proceedings?

Is a Magistrate before taking proceedings under s. 145 of the Code of Criminal Procedure, bound to make inquiry to ascertain who have, or claim to have, any, right to possession, either actual possession or possession through receipt of rent from tenants claiming to cultivate the lands in dispute?

If he does take fresh proceedings on further information since acquired, are such proceedings separate and distinct, or are they in continuation of the former proceedings, so as to relate back in point of time to the date on which they were first taken?

Are proceedings under s. 145 of the Code of Criminal Procedure, bad for want of jurisdiction because some person claiming to have possession in some way of the lands or of a portion of the lands in dispute has not been made a party, although he was not one of the parties in the dispute likely to cause a breach of the peace, so far as appeared from the information on which the Magistrate acted, and even if such person has not appeared and raised any objection on this account?

Are proceedings under s. 145 bad for want of jurisdiction because some of the parties are concerned only with possession of a portion of the lands in dispute?

CRIMINAL MOTION No. 730.

Mr. Hill (Mr. P. L. Roy, Babu Atulya Charan Bose and Babu Harendra Narain Mitter with him) for the petitioners.

(1) (1901) 5 C. W. N. 710.

(3) (1887) I. L. R. 15 Calc. 31.

(2) (1881) 10 C. L. R. 523.

(4) (1889) I. L. R. 16 Calc. 513.

(5) (1901) 5 C. W. N. 544.

S. 145 of the Criminal Procedure Code enacts that a Magistrate on being satisfied that a dispute likely to cause a breach of the peace exists concerning any land or water shall make an order in writing, stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend his Court, etc.

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The question to be determined is, who are "the parties concerned in such dispute?" According to the referring Judges they are those only, who are likely to create a breach of the peace. This is, I submit, too narrow a construction: parties mean "all parties" concerned in the dispute.

The word "concerned" is of ambiguous import, it may cover either parties "interested" in the dispute, that is, in the result or outcome of the dispute, or the parties "engaged" in the dispute. In either view it cannot be limited to only such of the parties engaged in the dispute as are likely to cause a breach of the peace.

The narrower construction is due to a regard only to the immediate object in view, namely, the prevention of a breach of the peace; the method prescribed by the Legislature of the attainment of that object being wholly disregarded, that is, an adjudication between the parties concerned in the dispute as to which of them is in actual possession. But as the power is to adjudicate on the right to possession, though only for a temporary period, *i.e.*, until the party in whose favour the adjudication is made is evicted in due course of law, the jurisdiction carries with it and implies that all parties whose rights are adjudicated upon must have the right of being heard.

Your Lordships must bear in mind the maxim *audi alteram partem*; it is against justice and right to make a judicial order against a man without hearing him. See *James Bagg's case*(1). It therefore becomes the duty of the Magistrate to ascertain who are the parties concerned in such dispute and to require their attendance. This inquiry may delay the proceedings under s. 145 and cause inconvenience, but this is an inseparable result

(1) 6 Coles Rep. 93.

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of the anomalous and special jurisdiction conferred on the Magistrate.

The inconvenience put forward by the referring Judges that a Magistrate would be restrained from acting under s. 145, until he had held an inquiry of a somewhat intricate character, and that the breach of the peace, which it is the object of the law to enable him to prevent, would take place, possibly with bloodshed, would be overwhelming, if the Magistrate's powers were only those conferred by s. 145, but he has the more drastic remedy given him by s. 107 of the Code, under which he may, if necessary, imprison the person likely to create a breach of the peace.

There is another inconvenience mentioned in the reference, that is, where, owing to the lapse of time, consequent on fresh proceedings, the Magistrate could not give a person the order he was entitled to. That is a case of hardship to a particular individual under particular circumstances, but individual hardship not infrequently results from enactments of general advantage. (Maxwell on Interpretation of Statutes, pp. 247-48). If adjudication could be made without hearing those thereby affected, the fundamental maxim would be lost sight of and the injustice would be general.

This being a jurisdiction of a very special and admittedly an anomalous character, it would be well to consider the history of its origin and development.

Regulation XLIX of 1793 first dealt with this matter. It was a Regulation for preventing affrays respecting disputed land or crops under pretext of claiming it or them and also for awarding compensation. This Regulation gave jurisdiction to the Judge of the *Dewanny Adaulut*, who also exercised the functions of a Magistrate, and the parties between whom he had to adjudicate were rival claimants to the land, etc. The word 'claimant' is used, that is, any person interested in the land and not only concerned in the dispute. This is clear on reference to s. 5, which contemplates restitution being made to a claimant, if he be dispossessed of land, though he be not present, and if any person be wounded, etc., by the agents, dependants or servants of a claimant, the remedy is against the claimant, who forfeits his right to the

disputed property, if it be found he had connived at what had been done.

The Judge under the above circumstances acted in his civil and not Magisterial capacity.

Then, we have Regulation VI of 1813 for referring to arbitration disputes between parties respecting the property of land. In s. 5 the Legislature dealt with cases in which the parties disputing as to the possession of land were not inclined to seek redress in the Civil Courts, and provided that the parties to a dispute concerning land were to be called on to attend the Court and adduce proof of their forcible dispossession. Here we have the commencement of the present procedure under s. 145 of the Code. This view is strongly supported by cl. 3 of s. 5 of the Regulation, as it includes that branch of the present procedure covered by s. 146 of the Code.

These Regulations had for their object the settlement of disputes relating to land, irrespective of the parties being actively engaged in the dispute itself, the ground being that the disputes were likely to cause breaches of the peace, and when the Court intervened it had to get the parties interested in the land before it and get a final adjustment. This jurisdiction was exercised by the Civil Courts, but was by Regulation XV of 1824 transferred to Magistrates. The power to award compensation was, however, taken away, but the main features as to the jurisdiction remained the same: the object was to prevent a breach of the peace, and the method was by adjudicating between rival claimants of the land in dispute.

By this Regulation was provided the summary procedure now embodied in s. 145 of the present Criminal Procedure Code. The parties in cl. 3 of the Regulation of 1824, whom the Magistrate was to call on to attend before him, were all those interested in the land. The word "parties" is used in place of the word "claimants" in the two former Regulations. The word "claimants" included all those whose claims had led to proceedings before the Judge, and they were to be sent up before him, showing clearly that his jurisdiction extended beyond those likely to create a breach of the peace, and extended to all who

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at the time of the initiation of the proceedings were preferring rival claims, that is, who were disputing concerning the land.

When the concurrent jurisdiction was given to the *Fouzdary* Court, the Magistrate was only authorised to give possession: he could not award damages, and all parties who had claims to urge by way of damages had to be referred to the Civil Court for redress. This shows that all the parties interested in the land had to be before the Magistrate.

Regulation II of 1829 rescinded s. 6 of Regulation XV of 1824 with regard to appeals, and made it competent to the Commissioners on circuit to receive appeals from Magistrates and to confirm, alter or revise any order or direct a further inquiry to be made in the matter.

Act IV of 1840 purported not to make a new law, but to amend the law for preventing affrays concerning the possession of land and to remove doubts which had arisen upon the interpretation of Regulation XV of 1824. The amendments introduced did not affect the general principles which were involved in the jurisdiction, which was continued by the Act. Nor has any subsequent Act done so; the object and the method of attaining that object remaining as before; the parties to be brought before the Court are under the Acts the same as the parties under the Regulations, that is, "all rival claimants," whether any particular claimant is or is not likely to enforce his claim by force such as is likely to lead to a breach of the peace. By s. 2 of the Act all parties concerned in such disputes are to be called upon to attend, and s. 7 provided for the punishment of any person opposing any order passed by the Magistrate by force. That shows that all parties, whatever be their position, were to be made parties, because, suppose the Magistrate found an outsider to be in possession, was he to make an order between the two parties disputing and tie up the land and make the outsider, who was known to be in possession, liable to be punished, if he interfered with the land? It was a limitation of a person's civil rights and could not be made, unless the person was heard. Unless there are specific words putting a narrower construction on the words in an Act, it is the duty of the Court to put the wider construction.

Next, we come to the Criminal Procedure Code, Act XXV of 1861, s. 318, which replaces the provisions of Act IV of 1840. There is nothing in s. 318, in which the words "all parties" are used, which indicates that only those engaged in the dispute are meant. S. 530 of Act X of 1872 is practically to the same effect as s. 318 of the earlier Code.

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Then comes the Code, Act X of 1882, s. 145, in which the words "tangible immoveable" are introduced. In this section the words "all parties concerned in" are altered to "the parties concerned." There is, however, I submit, no difference in the meaning. Additional powers also are given by this section enabling the parties to show that no dispute existed. That proviso has been extended by cl. 5 of the present Code of 1898, which permits "any other person interested to intervene, be heard and prove that no such dispute exists or has existed."

Under the present Code, cl. 3, s. 145, it is clear that a general citation is provided for to give all parties notice and enable them to come in. I submit the present Act has had the effect of overruling a whole mass of erroneous decisions, in which the Judges have given too much consideration to the object, *i.e.*, preventing a breach of the peace, and have not considered the general rules of justice, which prohibit an order being passed affecting a party, who is not present.

There is no doubt that the dispute is one concerning land, and the parties to the dispute are rival claimants to the land, though all may not be actually engaged in the dispute. The parties concerned in the dispute and the parties interested in the land are not the same. The rival claimants are those concerned in the dispute. I submit your Lordships cannot construe this Act without reference to the previous legislation.

It is an adjudication of civil rights by a Criminal Court, an anomalous jurisdiction which ought to be swept away altogether, an interference of civil rights for a limited period, and a party in a civil suit can come in and ask to have a person necessary to the suit made a party so that the case may be adjudicated in the presence of all the parties.

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In the case of *Dinomeni Chowdhurani v. Brojo Mohini Chowdhurani* (1), the Privy Council have held that an order under s. 145 of the Criminal Procedure Code of 1898 is evidence of the fact as to who the parties to the dispute were, what the land in dispute was, and who was declared entitled to retain possession. If that is so, such an order should not be made behind my back. As the value of the order as evidence would depend on whether all the parties were present or not, surely I as a party am entitled to say that I will have it at its highest evidentiary value, by having all parties brought before the Court.

How can there be an attachment without its affecting the rights of other parties, assuming there are others not disputing, who have a right to the property? Supposing a Receiver be appointed, how am I, a third party, an outsider, to collect any rent, which it is the duty of the Receiver to collect? Were I to do so, I would be guilty of contempt.

Under s. 145 of the present Code all disturbance is forbidden which means disturbance of any kind, and includes disturbance by outsiders.

Now that the effect of the enactments relating to this point has been considered, the cases under the enactments may be next dealt with.

The case of *Dewan Elahes Newaz Khan v. Suburnnissa* (2) was under s. 318 of the Act of 1861, and Justices Phear and Glover held different views as to the term "actual possession." Glover J. held that those in possession included "all parties concerned in the dispute, whether proprietors, farmers, etc."—not those who claimed to be the actual and manual possessors of the land.

In 1872 in the case of *Sutherland v. Crowdy* (3) under the same Act, it was held that actual possession was not mere bodily possession, but possession of a master by his servant, or of a landlord by his immediate tenant, or of a person, who had the property in the land by usufruct.

In the case of *Empress v. Thacoor Dyal Sing* (4) under s. 530 of Act X of 1872, it was held that constructive possession through

(1) (1901) I. L. R. 29 Calc. 187.

(3) (1872) 18 W. R. Cr. 11.

(2) (1866) 5 W. R. Cr. 14.

(4) (1878) I. L. R. 3 Calc. 320.

intermediate holders (*ticcadars*) was not such possession as was contemplated under that section.

In *Harak Narain Singh v. Luchmi Bux Roy*(1) it was held by Jackson J., where a zamindar had let his lands in farm, that he, his farmers, and the occupying ryots were all in their degree concerned in any dispute as to possession which might arise, and that they ought to be maintained in possession of the interests, which they severally enjoyed. In this case the broader view was taken.

In *Jibahan v. Bansrup Dhobi*(2) the Court held that no order under s. 530 of the Code of 1872 should be made against the servant of another person, who claimed possession of the land, without making that other person a party to the proceedings.

Under the Code, Act X of 1882, s. 145, in the case of *Behry Lal Trigunait v. Darby*(3), where the Magistrate made the manager of a company a party to the proceedings and an order was made in his favour, it was held that the order was bad, as the parties interested were not properly before the Court, the manager having no possession except as representing the company. This case was followed in *Brown v. Prithiraj Mandal*(4). In the cases of *Sarbananda Basu Mozumdar v. Pran Sankar Roy Chowdhuri*(5), *Abhayessari Debi v. Shidhessari Debi*(6), and *Ramasami v. Danakoti Ammal*(7) it has been held that a dispute as to the right to collect rents was a dispute within s. 145 of the Code of 1882. That is now the law under the same section of the present Code.

Under s. 318 of the Code of 1831 it was held that co-sharers, who were not concerned in the dispute, were not entitled to notice—*Gobind Chunder Ghose v. Anundo Chunder Sircar*(8).

In the case of *Kunund Narain Bhoop*(9) it was held that under the Code of 1872 there was no particular mode of giving notice calling upon parties to attend before the Magistrate.

(1) (1879) 5 C. L. R. 287.

(2) (1880) 6 C. L. R. 193.

(3) (1894) I. L. R. 21 Calc. 915.

(4) (1897) I. L. R. 25 Calc. 423.

(5) (1888) I. L. R. 15 Calc. 527.

(6) (1889) I. L. R. 16 Calc. 518.

(7) (1888) I. L. R. 12 Mad. 88.

(8) (1872) 18 W. R. Cr. 54.

(9) (1878) I. L. R. 4 Calc. 650.

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But the language of s. 530 indicated that notice should be addressed to known individuals, certain specified parties, and not in the form of a public citation. "All persons concerned" meant "the parties of whose dispute the Magistrate had knowledge."

There was no provision in s. 530 of that Code for allowing an intervenor to come in in the middle of the proceedings held by the Magistrate. This case is now done away with, I submit, by cl. 3 of s. 145 of the present Code.

It has been held that an order made in proceedings under s. 145 is binding only on those persons, who were the actual parties to the case before the Magistrate. See *Gopal Burnawar, in re*(1), *Nobo Kishore Chuckerbutty*(2), *Queen-Empress v. Kuppayyar*(3), *Janoki Nath Roy v. Queen-Empress*(4).

The case of *Goluck Chandra Pal v. Kali Charan De*(5), however, takes a contrary view as to this point. If the other cases are rightly decided, surely, if a party is entitled to bring in an outsider, he can say if that outsider is not before the Court that the Court cannot proceed without him; and if it does so, it acts without jurisdiction. I contend that "all disturbance" in cl. (6) of s. 145 of the present Code means disturbance by all parties.

If A, B, C, and D put forward claims to the same land and do not admit, but each disputes the claims put forward by the rival claimants, there is a dispute concerning land. If any of them, say A and B, are prepared to resort to violence to enforce their claims, that dispute is likely to lead to a breach of the peace, though C and D may be anxious for a peaceable settlement of the dispute. But the parties concerned in the dispute are all four, and under the words of the Code all four must be required to attend.

It is an essential condition of the exercise of the jurisdiction, that the Magistrate should endeavour to ascertain who are the parties concerned in the dispute, since he is to adjudicate which of them is entitled to retain possession, until evicted in due course of law by a civil suit.

It is a forced and ungrammatical construction to say the parties concerned in such dispute are those only, who are likely to create a

(1) (1869) 3 B. L. R. App. Cr. 13.

(2) (1894) I. L. R. 18 Mad. 51.

(3) (1880) 7 C. L. R. 291.

(4) (1898) 3 C. W. N. 329.

(5) (1886) I. L. R. 13 Calc. 175.

breach of the peace, and to deal with them alone would be to sin against the rule, which I contend to be a fundamental rule for the exercise of any jurisdiction.

Moreover, it would defeat the object in view, if A or B in the absence of C and D could obtain an order interfering with their rights and prevent them, without their being heard, from exercising those rights. That the order for possession would have that effect can scarcely be disputed, seeing s. 145 forbids "all disturbances, etc." and form XXII supports this view. Certainly the order for attachment under s. 146 would have that effect.

If, as stated in some cases, these orders bind only those who are parties to the Magistrate's proceedings and do not bind the real disputants, they become farcical and useless. There may be cases in which, on the grounds of absolute necessity for the general welfare, the Legislature may, having regard to the special object in view, abrogate the applicability of this fundamental rule, but it would require very explicit language to show that that was its intention; and in the absence of any express provision in the law excluding the right of a party affected by the decision of the Court to be heard in support of his rights, the fundamental rule must be given effect to. There is nothing in the language of the section, which expressly abrogates this fundamental rule: on the contrary, the law provides as a condition for the exercise of the jurisdiction that the Court shall require the attendance of the parties concerned in such dispute, which means all parties concerned therein. The omission of the word "all" in the Codes of 1882 and 1898 makes no real difference: "the parties" necessarily imply *all* the parties. In the *Queen-Empress v. Gobind Chandra Das* (1), the Magistrate being of opinion that the dispute was between parties 1 and 2 decided the question of possession between them, and parties 3 and 4, who were willing to give evidence as to their possession, were not allowed to do so. The High Court held that their evidence should have been taken. In *Sreemutty Rance Annondomoyee Debee v. Luchmun Pershad Gogo* (2), it was held that it would have been more regular, if the Magistrate had postponed the proceedings and made the representative of a deceased party a party to the proceedings.

(1) (1893) I. L. R. 20 Cal. 590.

(2) (1878) 3 C. L. R. 264.

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In *Bechu Sheikh v. Deb Kumari Dasi*(1) it was held by a majority that "parties concerned in the dispute" meant the parties concerned at the time the proceedings were initiated, and that there was no power to introduce parties, who were not concerned in the original dispute. Rampini J., however, held that the preliminary proceedings may, and in many cases must, partake of the character of a general citation to all the parties concerned in the dispute to appear; that it was not necessary for the Magistrate to confine his final order as to possession to the parties named in the preliminary proceedings.

I do not go quite so far as that. I contend that all parties concerned at the beginning of the proceedings in the subject of the dispute and whom the Magistrate came to know of during the proceedings should be made parties.

Again, in *Ram Chandra Das v. Monohur Roy*(2) it was held that all persons interested in or claiming a right to the property in dispute were included in the words "parties concerned." My contention is not so far reaching as "interested in," but includes only those, who are rival claimants to the possession. Suppose there is a dispute in January and the Magistrate in June discovers a necessary party who should have been made a party at the beginning, what is he to do? He should be made a party. There is no necessity to frame fresh proceedings, as it is the same and not a fresh dispute. If in a proceeding parties A and B are only made parties, and A in his written statement states that C is also a necessary party and that he claims to have C in as a matter of right. C should be made a party. The bringing of C in is provided for by cl. 3 of s. 145 of the present Code.

If, in consideration of the evidence under cl. 4, the Magistrate discovers that C is in possession and should have been made a party from the beginning, what is there in the law which says that he should not bring in C? The Magistrate cannot shut his eyes to the fact and proceed with the case without making him a party.

(1) (1898) I. L. R. 21 Calc. 404.

(2) (1898) I. L. R. 21 Calc. 29.

In *Janaki Nath Roy v. The Queen-Empress*(1) it was laid down that members of a joint family, who would be affected by the order of the Magistrate, should be made parties to the proceedings.

The opinion of the Full Bench in *Protop Narain Singh v. Rajendra Narain Singh*(2) as to what Magistrates should do with regard to parties is no doubt *obiter*, but at the same time it is worthy of attention. But it is unnecessary, as suggested in that case, to initiate fresh proceedings.

In *Laldhari Singh v. Sukdeo Narain Singh*(3) the Court held that the Magistrate should have brought in certain tenants, who were put forward as necessary parties, and his omission to do so was an illegality and a question of jurisdiction.

Where jurisdiction is given to a Court by an Act upon certain specified terms contained in the Act, those terms must be complied with in order to create jurisdiction—see *Nusservanjee Pestonjee v. Meer Mynooddeen Khan Wullud Meer Sudroodeen Khan Bahadoor*(4). The having of the necessary parties before the Magistrate in proceedings creates the jurisdiction. In *Ganesh Jalia v. Ajubali Chaudhuri*(5) your Lordship the Chief Justice held that the words “concerned in the dispute” were not limited to the parties actually concerned in the dispute, but included parties concerned in the subject-matter of the dispute, who would be affected by the Magistrate’s order.

The principal object which a proceeding under s. 145 aims at is a prevention of a breach of the peace, and that object cannot be achieved, if persons who are interested in or in claiming possession of the land in dispute and persons who are alleged to be in possession of a portion of such land are not made parties to it, and an order made under the section in the absence of such parties is made without jurisdiction—*Anesh Mollah v. Ejahar-uddi Mollah*(6) and *Mangal Haldar v. Naimuddi Fakir*(7).

(1) (1899) 3 C. W. N. 329.

(2) (1896) I. L. R. 24 Calc. 55.

(3) (1900) I. L. R. 27 Calc. 392.

(4) (1855) 6 M. I. A. 134 (155).

(5) (1900) 4 C. W. N. 753.

(6) (1901) I. L. R. 28 Calc. 443.

(7) (1901) 6 C. W. N. 101.

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The ground for placing a narrower construction on the words used is based simply on the fact that the immediate object being to prevent a breach of the peace that object would be defeated, if the Magistrate had first to ascertain who were the parties really concerned in the dispute. I have already shown he has another way of preventing a breach of the peace. The conditions for the exercise of the jurisdiction and the method provided for attaining that object under s. 145 being such as the section states, they carry with them and import that all ordinary rules for the administration of justice should be adhered to except in so far as those rules are expressly abrogated. So far from abrogating them, the section states that "the parties," i.e., as I read it, "all parties concerned in the dispute," shall be required to attend before the Magistrate can proceed with his inquiry.

It has been argued that the abrogation of the rule must be inferred because (1) there is no provision for a general citation, (2) there is no provision for intervention, (3) there is no provision that the proceeding shall not abate on the death of the party cited.

I submit the cases so far as they support these propositions erred in giving undue prominence to the object to be attained and in wholly disregarding the method provided by the Legislature for attaining that object, and thereby losing sight of the fundamental propositions underlying the exercise of all jurisdiction.

But such difficulties as might have arisen on the words of the former Code have been removed by Act V of 1898.

With regard to (1), cl. (3) of s. 145 provides for a general citation, and thereby shows that the Legislature intended to confer a right of intervention (2) and this right is confirmed by cl. (5), which allows any other person interested, which clearly means a person not cited, to attend, whereas the corresponding clause in the Code of 1882 only referred to persons required to attend. By the use of the word "interested" instead of "concerned in the dispute," cl. (5) allows persons interested in the result of the dispute, though not actually concerned therein, i.e., claimants, whose rights are not in dispute, to come in and put an end to the proceedings by showing that there was no longer, or never had been, a likelihood of a breach of the peace. As to (3), cl. (7) clearly provides that proceedings shall not abate by reason of the death of any of the parties thereto.

The answers to the questions referred to the Full Bench should therefore be as follows :—

Question I. No.

Question II. The Magistrate is bound to ascertain all the persons concerned in the dispute, and for that purpose must make an inquiry.

Question III. A fresh proceeding would seem to be unnecessary, so long as the dispute is the same and not a fresh dispute.

Question IV. All persons concerned in the dispute likely to cause a breach of the peace, whether named in the information on which the Magistrate acted or not so named, are proper parties to the proceedings, and the Magistrate who, in the course of such proceedings, ascertains that a person not named in the information was in fact a party to the dispute likely to cause a breach of the peace, is bound to make him a party.

Question V. Yes. Here the same persons are not claiming the same land, but different plots; it is not a common dispute; the owners of the plots are different; it cannot be said that the subject-matter is the same or that the dispute is concerning the same immoveable property. The words of the Code show that there is only one subject-matter of dispute. Where there are several plots concerned, there may be a common invasion of the whole, but the subjects of dispute are different and the section would not apply; whereas, on the other hand, where there is one integral whole formed of parts it would.

The Advocate-General, Mr. J. T. Woodroffe, (M. Serajul Islam, Babu Dasarathi Sanyal and Babu Amarendra Nath Bose with him), for the opposite party. My learned friend has dealt with the Regulations and other Acts, and has argued that those Acts, etc., should be considered as showing that there has been a continuity in the procedure, etc. As a matter of fact, he has shown that there has been no continuity: the matters are different, and so are the Courts. The proper mode of dealing with an Act intending to codify a particular branch of the law is, in the first instance, to examine the language of the statute and to ask what

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is its natural meaning uninfluenced by any considerations derived from the previous state of the law and not to start with inquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a Code a particular branch of the law, is to be treated in this fashion, its utility would be almost entirely destroyed, and the very object with which it was enacted would be frustrated. See the case decided by the Privy Council—*Norendra Nath Sircar v. Kamalbasini Dasi*(1). I therefore do not propose to address myself on the ancient law, as it does not show the state of the present law.

The object of s. 145 is the prevention of breaches of the peace. It is with this view only that Magistrates are invested with any jurisdiction touching the rights with regard to possession in land. We must see what was the evil aimed at: then we can see what remedy is to be applied.

My learned friend says you must recollect the dispute is respecting land, and therefore you must consider who are concerned in the land and not regard the likelihood of a breach of the peace being caused. The section provides that the Magistrate ~~must~~ be satisfied that there is a dispute likely to cause a breach of the peace concerning land; his being satisfied gives him jurisdiction—*Obhoy Chandra Mookerjee*(2); *Damodur Biddyadur Mohapatro v. Syamanund Dey*(3); *The Queen-Empress v. Gobind Chandra Das*(4), and not the fact of having the parties before him, as if he were trying a civil suit. The result of some of the decisions has been that the Magistrates' Courts have been flooded with these cases, and Magistrates have been instituting inquiries as to who were in possession, thereby frustrating the object of the section. If the Magistrate after making the inquiries makes a mistake in his abstract of title, the whole proceedings are void.

The section says the Magistrate must be satisfied that there is a dispute, etc. If that is the foundation of his jurisdiction, why import the words "when he has ascertained who the persons

(1) (1896) I. L. R. 23 Calc. 563, 572.

(2) (1891) I. L. R. 7 Calc. 385.

(3) (1893) I. L. R. 10 Calc. 78.

(4) (1893) I. L. R. 20 Calc. 520, 525.

are claiming to be entitled to the property?" You cannot divide the dispute into one concerning land and then require the Magistrate to ascertain whether it is likely to result in a breach of the peace. What is necessary is a prompt remedy to prevent a breach of the peace. S. 145 was not intended to enable persons to try out questions of possession. As to what would be done by the Magistrate in the particular A, B, and C case put forward by Mr. Hill remains to be seen when the point arises. The section states that the Magistrate must make an order in writing, etc., requiring the parties concerned in such dispute to attend in Court, etc. This is not a general citation nor is it affected by s. s. (3). The decisions tend to show that the order is not in the way of a general citation, but is to be addressed to certain specified persons who, the Magistrate is satisfied, are likely to cause a breach of the peace, calling on them to attend.

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Sub-section (3) does not give sanction to the *dissentient* decision of Rampini J. in *Bechu Sheikh v. Deb Kumari Dasi*(1). It only indicates the mode in which the order is to be served on the persons to whom it is directed, and that one copy should be affixed on some conspicuous place.

From the beginning it was intended that notice should only be given to the persons, who were concerned in the dispute and were indicated in the information before the Magistrate—*Gobind Chunder Ghose v. Anundo Chunder Sircar*(2). The service of the notice is now provided for by s. s. (3). The Magistrate is not bound to include in his order every person who may be mentioned in the police proceedings, but only such as at the drawing up of the order he is satisfied are the persons concerned in the dispute. He must not, however, go beyond the information before him, and with regard to those mentioned in that information, he has discretion.

The words "subject of dispute" in s. s. (3) and the words "any other person interested" in s. s. (5) refer to persons interested in the subject of dispute. In *Bechu Sheikh v. Deb Kumari Dasi*(1) Rampini J. went much farther than Mr. Hill. The word "none" in s. 146 cannot be read as "no one," showing that there was

(1) (1898) I. L. R. 21 Cal. 404.

(2) (1872) 18 W. R. Cr. 54.

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a general citation under s. 145. It was put in because it was contemplated that there might be more than two parties; in the warrant of attachment in Schedule V, the word "neither" is still retained. The wording of s. s. (3) indicates that the persons to come in are those on whom the Magistrate directs the order should be served, that is to say, the persons who, upon the information before him, the Magistrate comes to the conclusion are the persons concerned in the dispute. S. s. (5) does not have the effect of making persons interested parties. S. s. (4) clearly indicates the chronological order of the proceedings, and shows that s. s. (1) and (3) should be read together. The contention that "parties concerned in the dispute" means the parties concerned in the land as to which there is a dispute, though not claiming it before the Magistrate, is, I submit, incorrect; nor can it be said that the Magistrate would be deciding the case behind a man's back without first hearing him. What I wish to show is that it is not necessary to bring in other parties, and that there is no question of jurisdiction, if they are not brought in, nor are they affected by any order passed in those proceedings.

The words in s. s. (6) "forbidding all disturbance" when read with the context, and in view of the general principle, where the object of the law is the prevention of disturbance and not the adjudication of a right, means all disturbance by persons not found to be in possession, of persons found to be in possession by the order, and not disturbance by all persons. My learned friend has cited no authority in support of his contention, that all disturbance means disturbance by all persons. The cases against that contention are: *In the matter of Gopal Burnawar*(1); *In the matter of Nobi Kishore Chuckerbutty*(2); *Queen-Empress v. Kuppayyar*(3); *Bechu Sheikh v. Deb Kumari Dasi*(4); *Janaki Nath Roy v. The Queen-Empress*(5).

Section 145 and s. 146 cannot be read together, but should be read separately. S. 146 assumes something different to the state of things contemplated by s. 145. Under s. 146 the case is one of vacant possession with regard to the parties before the Court.

(1) (1869) 3 B. L. R. Ap. Cr. 13.

(3) (1894) I. L. R. 13 Mad. 51.

(2) (1890) 7 C. L. R. 291.

(4) (1898) I. L. R. 21 Calc. 404.

(5) (1899) 3 C. W. N. 329.

The attachment under the section may affect the rights of third parties, but with regard to that I would say that those parties would be allowed to come in and show their possession.

The case of *Gluck Chunari Pal v. Kali Charan De*(1) is the only case cited on the other side, and that is distinguishable, as the parties therein mentioned were aware of the order and were rightly convicted for disobeying it. Persons privy would be affected by the provisions of the Limitation Act.

The answers to the questions referred to the Full Bench should therefore be as follows:—

Question I. No, because the other parties are not affected by the proceedings.

Question II. No, also. The Magistrate must ascertain that the dispute is about land, and he should also ascertain, who are the parties to the dispute claiming possession of the land.

Question III. The proceedings are separate and distinct, and not a continuation of the former one.

Question IV. No.

Question V. Yes.

CRIMINAL MOTION No. 834.

Mr. Dunne (*Bibu Harendra Narain Mitter* with him) for the petitioners. With regard to the point as to who are the parties concerned, it has been very fully argued by my learned friend Mr. Hill, and I have nothing further to add.

Originally these proceedings were between two sets of tenants, who were disputing. On objections raised by them the Court drew up fresh proceedings and brought in two sets of zamindars. There was no fresh information showing that there was a likelihood of a breach of the peace at the time that the fresh proceedings were taken. I submit the point is covered by the Full Bench case of *Protap Narain Singh v. Rajendra Narain Singh* (2), and that your Lordships are bound by that case, which lays down that, where it appears to the Magistrate that it is absolutely necessary that other parties should attend and he is satisfied that the danger of a breach of the peace still exists, then he may initiate a new proceeding.

(1) (1886) I. L. R. 13 Calc. 175.

(2) (1896) I. L. R. 24 Calc. 55.

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As to the point, that one and the same proceedings should not be instituted when the dispute is between different sets of tenants claiming different plots under different rights, he who claims one plot of land should not be dragged into such a dispute under s. 145, and his claim tried along with the other claims. The result would be disastrous, if the decision went against him and the opposing set of tenants were put into possession of the whole land in dispute. In order to recover his one plot he would have to institute a civil suit and make all the tenants composing the other side parties.

Mr. Pugh (Babu Shama Prosunno Moumdar with him) for the opposite party. The question of jurisdiction depends upon whether the Magistrate has power judicially to examine a case and decide upon it, when he takes it up. Any irregularity or illegality during the proceedings cannot oust the jurisdiction of the Magistrate, when once acquired. The question as to whether there should or should not be a multiplicity of suits is one of procedure and in no sense one of jurisdiction.

In putting a construction upon what is laid down in the Full Bench case of *Protap Narain Singh v. Rajendra Narain Singh* (1), we must see what the circumstances of that case were. There was nothing to show in that case that the man, who they sought to have added as a party, had anything to do with the case at the commencement. In the present case the landlords were mentioned in the first instance, and the Magistrate in the exercise of his discretion did not make them parties, but did so later on. This question as to parties was not raised before the Full Bench, nor was it the intention in that case to lay down a broad proposition but only to deal with the particular circumstances in that case.

Where a Magistrate is satisfied that a dispute likely to cause a breach of the peace exists concerning land, he has jurisdiction to proceed under s. 145 of the Code. Errors in procedure do not affect his jurisdiction; the Magistrate has a discretion as to who should be made parties; if he exercises his discretion wrongly, it does not affect or do away with his jurisdiction. The Act has been altered since the Full Bench case, and your Lordships can now interfere only on a point of jurisdiction, the object being to get these

(1) (1898) I. L. R. 24 Calc. 55.

disputes settled quickly. Adding parties wrongly would be an error of procedure, an irregularity. If a party choose to waive such an irregularity, he would be bound by the proceedings, and if that is so, it cannot be a question of jurisdiction. It could never have been intended that because another person is added, that the Magistrate is to start afresh and call for a fresh police report as to the facts.

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The answers to the questions referred to the Full Bench should therefore be as follows:—

Question I. No. The Magistrate has exercised the discretion vested in him. It is not a question of jurisdiction.

Question II. There is nothing further to add to what has been stated in the order of reference. No procedure of this kind is provided for, and any such action by the Magistrate would be against the summary nature of the proceedings.

Question III. This has been dealt with by the Full Bench and referred to by me.

Question IV. No. How could the Magistrate hold a summary inquiry, if he had to enter into all these other inquiries?

Question V. No.

PARSONS C.J. I agree in the judgment delivered by Mr. Justice Hill. The matters under consideration have been so fully discussed in the order of reference and in his judgment that there is little to add.

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The reported cases to which dissent has been expressed in the order of reference seem to have proceeded on the ground that proceedings under section 145 of the Code of Criminal Procedure should be regulated on the same principles as if the Magistrate were trying a civil suit involving a right to possession, and that, unless all persons having any possible claim are made parties to those proceedings, they are bad for want of jurisdiction. That was also the argument addressed to us by Mr. Hill. But the law does not require this, nor is it the object of proceedings under section 145 that the Magistrate should deal with the matter before him, as if he were acting as a Civil Court. The object in view is to prevent

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a breach of the peace by determining the actual possession of land, etc., in dispute between certain parties, who are likely on this account to break the peace. The Court has, however, recognized that a determination of actual possession between the disputing parties might affect the rights of absent parties really in possession, and that such persons are entitled to be heard. That seems to me to be going beyond the letter of the law and also the object in view. It may be very desirable that such parties should be heard, so as to avoid a possible injustice by determining in their absence an issue which may affect their rights. But whether a particular person should or should not be brought in is a matter on which the Magistrate should exercise his discretion. The law nowhere declares that such person is entitled to come into the proceedings, and therefore, although in refusing to hear him, the Magistrate may not be exercising his discretion properly, it cannot be said that such refusal amounts to a refusal to exercise jurisdiction under the law. The object in view is to prevent a breach of the peace between certain parties found to be in dispute by determining the subject-matter of that dispute, not the determination of actual possession or a right to possession in regard to all persons, who may possibly be concerned in such a matter. It is the duty of the Magistrate to avoid doing injustice to others, when holding his proceedings, so as to arrive at the final order in regard to actual possession, but his jurisdiction cannot be affected by the fact that he may not have heard one, who was not mentioned, in the information on which he has acted, as in dispute or in the order in writing on which his proceedings have been taken. The final order has effect only, until a competent Court has determined "the rights of the disputing parties thereto or the person entitled to possession thereof." By this means the probable breach of the peace is prevented. This is the paramount consideration, and I may appropriately point out that this has so been regarded in respect of an order under section 144 which may restrain a person from the exercise of his lawful rights of property, because such exercise is likely to cause a breach of the peace. There are many reported cases on this subject in which, for instance, the right to hold a *haat* (market) by a man on his own land has been prohibited for this reason.

The judgment of the Full Bench in *Protap Narain Singh v. Rajendra Narain Singh*(1) is obsolete in consequence of the modification of the law by the enactment of sub-section (3) for the obvious object of directing a public notification to be made, on the locality, of the order in writing. Taking proceedings under section 145 can have been only with the intention of enabling others than those personally served with such order to come in, if they are affected by the proceedings taken. As one of the referring Judges, I would here explain that the third point put to the Full Bench proceeded only on that judgment being in force.

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On the last point referred, I would desire to state that it is impossible to lay down any general rule in regard to proceedings of a Magistrate under section 145 and how far they should be confined in each case to a particular plot of land claimed by one of the parties. Suppose, as in the case of *Laldhari Singh v. Sukdeo Narain Singh*(2) a number of persons backed by their landlord are disputing with others backed by their landlord in regard to possession of lands, and from the information before the Magistrate they are acting in combination. As between the zemindar landlords there would be no difficulty, but to require the Magistrate to hold separate proceedings in respect to each plot of land claimed by each of the ryots, would be to require him to undertake what would be almost impossible from the intricate character of such proceedings. The jurisdiction of the Magistrate would depend upon the nature of the information, on which he has acted. If the dispute so brought to his notice is one likely to cause a breach of the peace, it would be impossible to characterize his proceedings as without jurisdiction, because in the course of the judicial inquiry subsequently held the claims of some of the parties related only to particular plots of land out of the entire area in question. His findings should naturally be directed to possession of particular plots, but that he did not take separate proceedings in respect to each plot would not invalidate his entire proceedings. What might be the nature of a suit brought to set aside the final order passed in respect to possession proceedings by the Magistrate seems to me to be irrelevant. The object of the Magistrate's proceedings is to prevent a breach

(1) (1896) I. L. R. 24 Calc. 55.

(2) (1900) I. L. R. 27 Calc. 892.

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of the peace shown to be likely to take place from the police report or other information on which he has acted, and he has sufficiently complied with the law, if he finds possession of the lands in dispute in respect to each of the claims made. It cannot be justly said that his proceedings are without jurisdiction. I would, therefore, answer the last point referred in the negative.

BANERJEE J. These two cases were heard together.

Case No. 730 arises out of a proceeding under section 145 of the Code of Criminal Procedure, instituted by the Subdivisional Officer of Tangail, in which Abdul Jubbar Chowdhry and others were the first party, and Brojendro Kumar Roy Chowdhry, predecessor in interest of the petitioner before this Court, was the second party. The Magistrate having made an order for the attachment of the property in dispute under section 146 of the Criminal Procedure Code, the petitioner obtained a Rule calling on the other side to show cause why the order should not be set aside on three grounds, namely :—

First. That the Magistrate had no authority to add parties.

Second. That certain necessary parties, namely, the tenants, had not been made parties.

Third. That the facts found did not authorize an order under section 146.

Case No. 834 arises out of another proceeding under section 145. The Magistrate having passed an order in favour of the first party, the second party obtained a Rule calling upon the former to show cause why the order should not be set aside on these grounds, namely :—

First. That the Magistrate had no information upon the date of the institution of the proceedings that there was any likelihood of a breach of the peace.

Second. That the dispute being between different persons claiming different parcels of land, the institution of one proceeding dealing with them altogether was bad.

Third. That the order was based upon a local investigation, which the Magistrate was not competent to make.

The learned Judges, who heard these two Rules, being unable to agree with the view taken in certain cases, namely, *Ram Chundra Das v. Monohur Roy*(1), *Laldhari Singh v. Sukdeo Narain Singh*(2), *Anesh Mollah v. Ejaharuddi Mollah*(3), and *Mangal Halder v. Naimuddi Fakir*(4), on the questions how far defect of parties vitiates proceedings under section 145, and how far a Magistrate is bound to inquire as to who the parties to the dispute are, and in the case of *Rajah Rameswar Persad Narain Singh v. Harbans Singh* (5) on the question whether the joinder of parties vitiates such proceedings, have referred the two cases to a Full Bench for the determination of the following points:—

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1. Are proceedings held under section 145 of the Code of Criminal Procedure, bad for want of jurisdiction, because the Magistrate on information before him has made parties to such proceedings only those who are actually in dispute and who are likely by such dispute to cause a breach of the peace, when in the course of the proceedings so taken it is brought to his notice that some other party is interested in the subject matter of the dispute, that is, is likely to be affected by the order to be passed in respect of the possession of the land in dispute. Is the Magistrate bound to stay such proceedings?

2. Is a Magistrate before taking proceedings under section 145 of the Code of Criminal Procedure, bound to make inquiry to ascertain who have or claim to have any right to possession, either actual possession or possession through receipt of rent from tenants, claiming to cultivate the lands in dispute?

3. If he does take such proceedings on further information since acquired, are such proceedings separate and distinct, or are they in continuation of the former proceedings, so as to relate back in point of time to the date on which they were first taken?

4. Are proceedings under section 145 of the Code of Criminal Procedure, bad for want of jurisdiction, because some person claiming to have possession in some way of the lands or of a portion

(1) (1898) I. L. R. 21 Calc. 29.

(3) (1901) I. L. R. 28 Calc. 446.

(2) (1900) I. L. R. 27 Calc. 892.

(4) (1901) 6 C. W. N. 101.

(5) (1901) 6 C. W. N. 104.

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of the lands in dispute, has not been made a party, although he was not one of the parties in dispute likely to cause a breach of the peace, so far as appeared from the information on which the Magistrate acted, and even if such person has not appeared and raised any objection on this account?

BANERJEE J.

5. Are proceedings under section 145 bad for want of jurisdiction, because some of the parties are concerned only with possession of a portion of the lands in dispute?

Before proceeding to consider these questions, I think it necessary to determine whether the effect of sub-section (3) of section 435 of the present Code of Criminal Procedure (Act V of 1898) is to place orders under sections 145 and 146 altogether out of the revisional jurisdiction of the High Court. For if that is so, it would be useless to discuss the questions referred to us.

Though sub-section (3) of section 435 by declaring that proceedings under Chapter XII (in which sections 145 and 146 are included) are not proceedings within the meaning of section 435, excludes others under sections 145 and 146 from the revisional jurisdiction of this Court, so far as that jurisdiction is conferred by section 435, yet it cannot be said that such orders are placed beyond this Court's power of revision under section 15 of the High Courts Act, 24 and 25 Victoria, C., 104. The limits of this power [see *In the matter of Gobind Coomar Chowdhry v. Kristo Coomar Chowdhry*(1) *Nilmoni Singh Deo v. Taranath Mukerjee*(2) and *Muhammad Suleman Khan v. Fatima*(3) are no doubt narrower than those of powers conferred by section 435, it being confined to cases of orders made by a subordinate Court declining jurisdiction vested in it by law or made without jurisdiction, a description which includes orders made by application of any form of procedure to cases to which it does not apply, and also those made without complying with the material preliminary conditions required to be satisfied by the procedure prescribed. See *Birj Mohun Thakur v. Rai Uma Nath Chowdhry*(4) and *Gopi Mohun Mullik v. Taramoni Chowdhurani*(5).

(1) (1867) 7 W. R. 520.

(3) (1886) I. L. R. 9 All. 104.

(2) (1882) I. L. R. 9 Calc. 295.

(4) (1892) I. L. R. 20 Calc. 8.

(5) (1879) I. L. R. 5 Calc. 7.

That being the case, let us consider how far the errors in the proceedings referred to in the questions affected the jurisdiction of the Magistrate so as to make those proceedings open to revision by this Court.

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The first question referred to this Full Bench relates to the meaning of the expression "parties concerned in such dispute" occurring in sub-section (1) of section 145, and to the effect of an omission to make any of such persons parties to the proceeding. On the one hand it is urged that the special jurisdiction of the Criminal Courts to deal with the question of possession being conferred only for preventing a breach of the peace, the only persons, who can be made parties to a proceeding under section 145 of the Code of Criminal Procedure, are those engaged in a dispute likely to cause a breach of the peace; that it would defeat the object of the section, which is to enable the Magistrate promptly to settle disputes about possession, if he were to be held bound to make an elaborate inquiry as to who are the different parties interested in the subject of the dispute; and that it being left to the discretion of the Magistrate to make such persons parties to the proceeding as he may think fit, omission to make any person a party cannot affect the validity of the proceeding, especially when it is not open to the Magistrate to add any party after the case has been commenced, and in support of this contention the cases of *Kunund Narain Bhoop*(1) and *Protap Narain Singh v. Rajendra Narain Singh*(2) are relied upon.

On the other hand, it is argued that as orders under sections 145 and 146 bind the whole world, the words "parties concerned in the dispute" must mean all persons interested in the subject-matter of the dispute likely to be affected by any order made in relation to possession thereof; that it would be contrary to first principles to make any such order in the absence of parties, who may be affected by them; and that, if a Magistrate makes an order under either of those two sections without having before him all the necessary parties, his proceedings are in contravention of the procedure prescribed, and the order should be held as made without jurisdiction. And *James Bagg's case*(3), *Laldhari*

(1) (1878) I. L. R. 4 Calc. 650.

(2) (1896) I. L. R. 24 Calc. 55.

(3) 6 Coke's Rep. 93.

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Singh v. Sukdeo Narain Singh(1), *Anesh Mollah v. Ejaharuddi Mollah*(2), and *Mangal Halder v. Naimuddin Fakir*(3) are cited in support of this argument.

The old law on the subject was discussed at some length in the course of the argument, but having regard to the observations of their Lordships of the Privy Council in the case of *Norendra Nath Sircar v. Kamalbasini Dasi*(4), I do not think it profitable to pursue that discussion when the present Code of Criminal Procedure is clear on the point.

I am of opinion that though the jurisdiction of a Criminal Court to deal with questions of disputed possession under section 145 of the Criminal Procedure Code is of a limited character, and arises only when the dispute is likely to cause a breach of the peace, and though in the exercise of such jurisdiction the Magistrate must, to prevent any breach of the peace, act with all possible promptness, yet, when once the existence of such a dispute is made out to the satisfaction of the Magistrate, and he acquires jurisdiction to entertain the case, such jurisdiction cannot be said to be limited to calling upon the parties actually engaged in the dispute, but must extend to his calling upon all parties interested in the dispute, that is, claiming actual possession of the subject of dispute, to appear in person or by pleader, and to his calling upon or allowing any such party, though not originally expressly called upon to do so, to enter appearance at any subsequent stage of the proceedings, if the facts disclosed show such appearance to be necessary, and if the Magistrate refuses to make such party, a party to the proceeding, on the ground of want of power in him under the law to add any party to the proceeding, and not of absence of interest in such party in the subject of dispute as a matter of fact, the Magistrate declines a jurisdiction, vested in him by law, and his order may be set aside as involving an error of jurisdiction, and he may be directed by this Court under section 15 of the High Courts Act (24 and 25 Vict., C. 104) to proceed according to law.

The view I take is in accordance as well with the letter as with the spirit of the law.

(1) (1900) I. L. R. 27 Calc. 892.

(3) (1901) 6 C. W. N. 101.

(2) (1901) I. L. R. 28 Calc. 446.

(4) (1896) I. L. R. 23 Calc. 563.

Section 145 of the Code of Criminal Procedure enacts in sub-section (1) that when a Magistrate is satisfied that a dispute likely to cause a breach of the peace exists concerning any land (I refer only to so much of the section as bears upon this case) he shall make an order in writing requiring the parties concerned in such dispute to enter appearance, and to put in written statements of their respective claims as regards the fact of *actual possession* of the subject of dispute. The law then requires parties concerned, that is, interested in the dispute, and not merely those *engaged* in it, to be made parties, and requires them to put in their *claims as regards the fact of actual possession* of the subject of dispute. Every person who lays claim to actual possession of the subject of dispute is, therefore, a necessary party under sub-section (1).

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Passing over sub-section (2) which does not bear on the present question, we find important changes introduced by sub-sections (3), (5) and (7) of the present Code. Sub-section (3) requires the *publication* of the order *at or near the subject of dispute*, which is intended to serve as a general notice to all persons interested; sub-section (5) allows any person *interested* other than the parties expressly required to attend, to intervene and show that there is no real dispute existing; and sub-section (7) evidently contemplates the *substitution of the legal representatives of deceased parties*. These new provisions, in my opinion, make the principles laid down in the cases of *Kunund Narain Bhoop*(1) and *Protap Narain Singh v. Rajendra Narain Singh*(2), no longer applicable to cases under section 145. There is a general notice to all persons concerned in the dispute now required to be published and new parties may intervene or be substituted in the course of the proceedings.

It is argued that when a new party is introduced, the old proceeding must be at an end, and the Magistrate must be satisfied again that there is a dispute still existing likely to cause a breach of the peace. No doubt it is easy to conceive cases where, with the substitution of new parties, the former likelihood of a breach of the peace may cease to exist; as when the old disputants die leaving minor heirs, whose properties are taken charge of by the Court of Wards. But, as a rule, the mere addition of parties to a

(1) (1878) I. L. R. 4 Calc. 650.

(2) (1896) I. L. R. 24 Calc. 55.

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pending proceeding under section 145 does not imply cessation of the original likelihood of a breach of the peace, and does not, therefore, require the initiation of any fresh proceeding.

Then as regards the delay that may be caused by the addition of parties, who may claim to cross-examine the witnesses already examined and to adduce further evidence, the remedy is provided by the new proviso to sub-section (4) which authorizes the Magistrate in cases of emergency to attach the subject of dispute.

If the letter of the law thus clearly supports the view I take, the spirit of the law is still more clearly in favour of the same view. For apart from the question whether an order under section 145 or section 146 is binding on the whole world—a question which I do not determine, but to which an affirmative answer is favoured by the provisions of sub-section (3) of section 145, and sub-section (2) of section 146—such an order must prejudicially affect a person, who claims to be in possession of the subject of the dispute, but is not made a party to the proceeding, as it will be evidence against him under section 13 of the Evidence Act (see *Dinomoni Chowdhrani v. Brojo Mohini Chowdhrani*)(1), and he will have at least to apply to the Magistrate for the withdrawal of the order; and if that is so, it is but fair and just that he should have an opportunity of defending his case before such an order is made (see *James Bagg's case*(2), Maxwell on Statutes, 3rd Edition, p. 511).

This view is in accordance with the cases of *Ram Chandra Dass v. Monohur Roy* (3), *Laldhari Singh v. Sukdeo Narain Singh*(4), *Anesh Mollah v. Ejaharuddi Mollah*(5), and *Mangal Halder v. Naimuddi Fakir*(6).

I would therefore answer the first question in the negative, subject to this qualification that, if the Magistrate refuses to allow the intervention of a party claiming an interest in and actual possession of the subject of dispute, not on the ground of his having no such interest, but on the ground of the law not authorising the addition of any such party, his order is open to revision by this Court.

(1) (1901) I. L. R. 29 Calc. 187.

(2) (1777) 11 Rep. 93.

(3) (1833) I. L. R. 21 Calc. 29.

(4) (1900) I. L. R. 27 Calc. 1892.

(5) (1901) I. L. R. 28 Calc. 446.

(6) (1901) 6 C. W. N. 101.

The second question referred to us must be answered in the negative. The Magistrate should do his best to ascertain who the parties concerned in the dispute in a case under section 145 are. But his order cannot be pronounced to be vitiated by any error of jurisdiction merely because such inquiry has not been made or carried far enough.

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The second alternative of the third question also should, in my opinion, be answered in the affirmative, and the first alternative in the negative, if the fresh proceeding referred to in the question is the result not of any fresh dispute arising, but of fresh parties concerned in the old dispute being added as parties. I have already pointed out that by reason of the new provisions introduced into the present Code, section 145, sub-sections (3), (5) and (7), fresh parties may be added or substituted, such addition or substitution not putting an end to the original proceeding, and the rule laid down by the Full Bench in the case of *Protap Narain Singh v. Rajendra Narain Singh*(1), against such substitution or addition can no longer hold good.

The fourth question should, I think, be answered in the negative, a mere allegation that some person, who does not appear and raise any objection, has a claim to possession, cannot vitiate the proceeding for want of jurisdiction.

The fifth and last question should also, in my opinion, be answered in the negative, the fault in the proceeding which is referred to in that question being in the nature of an irregularity not affecting the jurisdiction of the Magistrate.

I would accordingly return the cases to the Division Bench which has made this reference, with the foregoing answers to the questions referred to us.

HILL J. Of the questions discussed at the hearing of these references, those only are really material which relate to the jurisdiction of the Magistrate, since it is only in cases in which a Magistrate has either acted without jurisdiction or improperly declined to exercise his jurisdiction, that this Court has now authority to interfere with his proceedings under section 145 of the Code of Criminal Procedure. In order therefore to bring these

(1) (1896) I. L. R. 24 Calc. 55.

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cases within the jurisdiction of this Court, it must be shown that the Magistrate acted in one or other of the ways mentioned. Otherwise we have no power of interference.

The two cases referred may be dealt with together, for all that I propose now to do is to express my views upon the questions submitted to us by the learned referring Judges, the ultimate disposal of the cases being in their hands.

Mr. Hill's contention on behalf of the petitioners in the first case was, that it was essential to the jurisdiction of the Magistrate that all persons concerned in the dispute which section 145 contemplates should be made parties to the proceeding, and that, if they are not, the proceedings are bad for want of jurisdiction. He contended that by parties concerned in the dispute was meant all persons claiming a right to possession of the land, etc., the subject of dispute, and that it was therefore necessary that all such persons should be brought into the proceeding in order to give the Magistrate jurisdiction to make the ultimate order for which the section provides. He also pointed out that that order is to forbid all disturbance of the possession of the person, whom the Magistrate declares to be in possession, until evicted in due course of law, and he argued that the effect of the order being consequently to adjudicate upon the civil rights of persons interested in the land, it would be opposed to the most elementary principles of justice that any one should be affected by it, who had not been a party to the proceeding.

I do not propose to follow Mr. Hill through the very numerous authorities, which he cited in support of these positions. Nor do I think that the historical treatment of the subject with which he dealt so skilfully is likely to throw much light upon the actual question now before us. The law, as it now stands, is the result of very recent legislation, and I think that section 145, although not perhaps altogether free from difficulties, may be interpreted without recourse being had to extraneous sources of information : all that need, I think, be said from this point of view is that the section as it now stands is virtually a re-enactment of the corresponding section of the Code of 1882 with, however, what appears to me to be a somewhat important addition relative to the summoning of parties, and another by which a person interested, who

has not been summoned to attend before the Magistrate, is enabled to show that no dispute exists or has existed. There are besides the new provisions as to abatement contained in clause (7) and the provisos to clause (4).

In entering upon a consideration of the section it is, I think, important to bear in mind the purpose with which it was enacted. It occurs in that part of the Code which relates to the prevention of offences, and its object is to bring to an end by a summary process disputes relating to land, etc., which are in their nature likely, if not suppressed, to end in breaches of the peace. The maintenance of the public peace was the object before the mind of the Legislature, and where that supreme object is in view, there can be no question but that the convenience and even the rights of individuals must at times be sacrificed for its attainment. It would therefore, I think, be improper, as the tendency has sometimes been, to lean too much in attempting to construe the section upon analogies derived from suits and other civil proceedings, the results of which are very different from those of proceedings under the section, and in which the rights of individuals *inter se* are alone in question. It is assumed as a possible consequence of a proceeding under section 145 that the owner of property may temporarily be deprived of possession of what is rightfully his and subjected to other inconveniences. But this and such like considerations it was presumably necessary to subordinate to the imperative necessity of preserving the peace.

Turning to the section itself, the principal point dwelt on at the hearing was the meaning of the words "parties concerned in such dispute," the contention being, as I have mentioned, that the jurisdiction of the Magistrate is dependent on his having all such persons before him. I cannot assent to that view. But in order to answer the different questions submitted to us by the reference, it is necessary that I should say something as to what I understand to be the proper interpretation of the words in question. Having regard to the object to which the proceeding is directed, I mean by that, the ascertainment of the person actually in possession at the time of the initial order under clause (1), I should feel disposed to think that they were intended to indicate all persons claiming to be then in possession, and, I think, that the Magistrate

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should endeavour to bring all such persons into the proceeding. But the scope of the inquiry under the section is confined to the fact of actual possession irrespective of the merits of the claims of the parties concerned. A claim therefore merely to a right to possession, as distinguished from a claim to be in possession, would be outside the scope of the inquiry. And this is, I think, shewn with sufficient clearness both by the provisions of clause (1) of the section regarding the matter to which the written statements of the parties are to be directed, and clause (4) which prescribes the question upon which the Magistrate is, if possible, to give his decision. I am unable therefore to agree in the view which has been taken in certain cases that all parties interested in, or claiming a right to, the property in dispute, are entitled to be, or should be made, parties to the proceeding. No doubt the difference may be slight in practice, inasmuch as persons who claim to be entitled to landed property usually claim to be in possession of it. But the test is not, I think, the true one, and if it were to be adopted it would lead to the creation of numerous difficulties in the application of the section and greatly impair its practical utility. Regard must be had moreover to the sources of the Magistrate's information and to what the nature of that information is likely to be. What is most likely to be conveyed to him is that so and so and so and so are disputing about the possession of land, and that, if he does not intervene, there will be a breach of the peace, and it is upon the basis of the information conveyed to him, as it seems to me, that the Magistrate is in the first instance to select the persons whom he will require to attend his Court for the purpose of laying their claims before him, How is he to ascertain, in order that his proceeding may be properly constituted, who all the persons interested in, or claiming a right to the property in dispute, are? To require him to do so would be to impose on him in some cases an almost impossible task, and would undoubtedly have the effect of unduly prolonging and greatly embarrassing his proceedings and of depriving them altogether in many instances of their summary character. What, I conceive, the Legislature intended was to bring the dispute to a prompt termination and to compel the parties concerned in it to set their differences at rest without delay and once for all by

having recourse to the Civil Courts. But proceedings under the section have too frequently, as any one acquainted with the criminal business of this Court must be aware, been protracted to a most lamentable degree by the application of such principles as those I have referred to above. On the other hand, it seems to me difficult to say that the dispute can be a matter of no concern to persons other than the actual disputants, when the result of the order passed under the section may be to remove from possession a third party, who is not a disputant.

Clause (3) of the existing section has however enlarged the powers previously reposed in the Magistrate as to the summoning of parties. I was at first disposed to think that the clause was introduced for the purpose of regulating the issue and service of process generally under the section, thereby leaving it virtually to the discretion of the Magistrate, what persons he would make parties to the proceeding. But, on further consideration, I think the intention was to empower the Magistrate, after he has issued the order provided for by clause (1) to the persons who, from the original information given him, it appears are claiming to be in possession, to bring in any other persons who from subsequent information it may seem to him proper to have before him. But the scope of the inquiry is not thereby enlarged. The copy which may be served under the clause is to be a copy of the order mentioned in clause (1) which requires the party to whom it is addressed to state his claims as to the fact of actual possession, and clause (4) confines the inquiry to the same fact. The clause in question was, I think, intended to be only supplementary to clause (1). Then the clause further provides for the publication of a copy of the order in a conspicuous place at or near the subject of dispute, probably with the intent on of guarding against collusive proceedings, as well as to give to any one interested, who may through an oversight or otherwise not have received a summons, an opportunity of coming in with his claim, and also to notify generally to all persons in the locality that a proceeding under the section has been set on foot. But I would say again that I do not think this general invitation was intended, any more than the power given to the Magistrate of summoning additional parties, to have the effect of altering the character of the inquiry.

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The only material question that still remains is the fact of actual possession.

Then by clause (4) it is provided that after the requirements of clauses (1) and (3) have been complied with, the Magistrate, without reference to the merits of the claims of "such parties" to a right to possession, is to peruse their statements, etc., and come, if possible, to a decision as to the fact of possession. The words "such parties" here must, I think, be interpreted with reference to the words in clause (1) "the parties concerned in such dispute" and must bear the same meaning,—the effect being to restrict the inquiry to the parties concerned in the dispute in the sense I have mentioned above, notwithstanding that persons other than these may have been summoned by the Magistrate or may have come in of their own accord on the publication of the copy of the order in the locality. It appears to me, I may add, from a consideration merely of the language used, as distinguished from the nature of the proceeding, that the words "the parties concerned in such dispute" must have been intended to extend to persons other than the actual disputants. There may, I think, be a dispute between A and B, which is likely to cause a breach of the peace to which C is not strictly a party, but in which he is nevertheless concerned as claiming to be in possession. Had it been intended to confine the proceeding to the actual disputants, I think the appropriate words would have been "the parties disputing." Had it, on the other hand, been intended to include all persons interested in, or claiming a right to, possession of the lands, etc., language conveying that meaning would presumably have been used.

Such being in my opinion the meaning of the words in question and the means prescribed by the Legislature for bringing the parties concerned before the Magistrate, the section next provides that the Magistrate shall enter upon the inquiry. Up to that point it appears to me that the Magistrate has very wide powers with respect to the persons whom he will bring into the proceeding. He may alter or add to the array of parties either of his own motion or on the application of any one claiming to be concerned in the dispute in the sense that he claims to be in possession. The initial order is, no doubt, intended to fix a time within which claimants are to come in, but it would not I

think be a matter of any materiality, if, after the date so fixed, but before the opening of the actual inquiry, parties were added. From that time onwards, however, it seems to me that it was not intended, subject to the provisions of clause (7), that any new parties should be brought in. The "person interested" who is empowered under clause (5) to show that no dispute exists or has existed, does not of course come in for the purpose of joining in the proceeding, but for the purpose of bringing it to an end. But the section contains no provision for the addition of parties after the commencement of the inquiry, and it was no doubt considered that the power conferred on the Magistrate by clause (3) of summoning such persons as he might deem proper and the means prescribed by the same clause for giving publicity to the fact that a proceeding under the section had been set on foot provided a sufficient guarantee that before the actual inquiry is entered upon all parties really concerned will either have been summoned to attend the proceeding, or will have had the opportunity of doing so afforded them, if they care to avail themselves of it. It would lead to much inconvenience and delay, if it were held that any one claiming to be concerned in the dispute was entitled to come in and join in the proceedings after the commencement of the inquiry. It would probably be necessary in such a case to start the inquiry afresh, as the party added would have a right to have the evidence taken in his presence, and, if several claimants successively were to come in in this way, it is evident that the proceedings might be indefinitely prolonged. I do not say that, if the Magistrate for sufficient reasons thought proper after the commencement of the inquiry to bring in an additional party, that his proceedings would therefore be bad, but I think that he would in doing so be acting in contravention of the intention of the Legislature. I ought, while on this point, to add that in my opinion the Full Bench decision in *Protap Narain Singh v. Rajendra Narain Singh*(1) cannot, in view of the alteration of the law introduced by clause (3) of section 145 as it now stands, be regarded as a binding authority on the construction of the section.

Then as to the question of jurisdiction. On being satisfied of the existence of a dispute likely to cause a breach of the peace

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(1) (1896) I. L. R. 24 Calc. 55.

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concerning land, etc., within his local jurisdiction, the duty, which is imperative, is cast upon the Magistrate of taking action under section 145. The two essentials are that there should be a dispute likely to cause a breach of the peace, and that the dispute should concern land, etc. The section does not primarily contemplate cases in which there have already been overt acts of violence. All the disputants may be persons of peaceable disposition, but if the dispute is in its nature of such a kind that it is likely, having regard to the known conditions of society, to lead to a breach of the peace, that is enough to warrant the Magistrate's intervention and to give him jurisdiction over the subject of dispute. Upon the existence of those conditions and those conditions only, is the jurisdiction of the Magistrate in my opinion dependent. The object, I think, is to take the subject of dispute, so to speak, out of the hands of the disputants, and to constitute one of them, whose possession the law will protect, its custodian until the other has established his right (if any) to possession in a Civil Court. In certain instances indeed the Magistrate is authorized himself to take possession so that none of the parties concerned may have possession, until a Civil Court has decided upon the right. But, be this as it may, questions of the misjoinder or non-joinder of parties do not ordinarily go to the jurisdiction. A Magistrate would no doubt be acting without jurisdiction, if he entered upon his inquiry without having issued the orders contemplated by clause (1) of the section. But questions of whether A ought to have been added as being a person likely to be affected by the proceeding, or B omitted as not being concerned in it, or whether C was added at too late a stage, and such like, are questions of procedure by which, in my opinion, the jurisdiction of the Magistrate is not affected.

There is, lastly, the point raised by the fifth question referred. Upon this question it is not very easy to generalize. But I should think that, when there are independent disputes relative to distinct parcels of land, they ought to be dealt with in separate proceedings. When, on the other hand, the dispute is one, the fact that it embraces several distinct parcels of land, is not, in my opinion, sufficient to necessitate an independent proceeding in respect of each. The matter is not, however, one which, as it appears to me, affects the jurisdiction of the Magistrate.

For the foregoing reasons I would answer the questions submitted to us as follows:—

Question I. To the first branch of the question my answer is—No. To the second branch—I do not think that the Magistrate would be bound to stay the proceedings.

Question II. I think the Magistrate ought, before entering on his inquiry under clause (4) of the section (though not as a preliminary to the initiation of the proceeding, for which latter purpose all that is requisite is that the Magistrate should issue the orders provided for by clause (1) to the parties named in the information), to satisfy himself to the best of his ability on the information before him as to who are the persons claiming to be in present possession of the subject of dispute, but that he is not concerned to ascertain what persons have or claim to have mere rights to possession.

Question III. I am not quite clear as to the intention of this question. But assuming it to relate to the addition of a party after the initiation of the proceeding, I would say that there is no necessity for a fresh proceeding, in consequence of such addition, assuming the party added to have been concerned originally in the dispute which is the foundation of the proceedings. Up to the time when the inquiry begins I think parties may now be added. If they are added after it has begun, I think that that would be an irregularity. But I do not think it would be necessary, in consequence, to initiate a fresh proceeding, but evidence previously taken ought, if the parties so added require it, to be again taken in their presence.

Question IV. No.

Question V. No.

BART J. I agree with Mr. Justice Hill and have nothing to add to what he has said in his judgment.

HENDERSON J. I also agree with the judgment delivered by Mr. Justice Hill.

D. S.

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CIVIL RULE.

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ELIAS

v.

GOVIND CHUNDER KHATICK.*

Contract—Principal and agent—Broker—Title—Brokerage.

A contracted with a broker to negotiate for a loan of money on the first mortgage of properties, and agreed to pay brokerage. The broker brought a creditor who was willing to advance the amount, and actually placed money in the hands of the attorney. The attorney found certain defects in A's title, and the transaction fell through.

Held, that, if a broker has negotiated a loan and found a lender willing to lend the amount, he is entitled to his brokerage, although the transaction was not completed by reason of the inability of A to satisfy the attorney as to the title.

Held, further, that, regard being had to the terms of the agreement, a broker is not bound to prove some real defect in the title in order to recover the remuneration claimed.

RULE granted to the defendant, Govind Chunder Khatick.

This Rule arose out of an application by the defendant to set aside an order passed by the Small Cause Court Judge of Sealdah, decreeing the plaintiff's suit for commission. The petitioner, Govind Chunder Khatick, engaged one Elias as a broker on the 14th August 1899 to negotiate for a loan of a certain sum of money for him.

A contract was entered into between the parties, and the material portion of it ran as follows:—"I hereby authorize you to negotiate as broker for a loan of Rs. 18,000 only, on the first mortgage of three properties, namely, Nos. 31 and 40, Tangra Road, in the suburbs, and No. 27-3, Ram Kanto Mistry's Lane, in the town of Calcutta, and I hereby agree to pay you brokerage at the rate of 4½ per cent. for negotiating such loan." Upon this contract Elias brought a suit for commission

* Civil Rule No. 3106 of 1902.

against the petitioner in the Court of Small Causes at Sealdah. The learned Judge of the Small Cause Court decreed the plaintiff's suit, having found that the plaintiff was entrusted to negotiate for a loan and he had brought a creditor, who was willing and had actually placed money in the hands of the attorney, and that the defendant, who was bound to satisfy the lender as to his title, had failed to do so, as the attorney found out certain defects, in consequence of which the transaction fell through.

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Dr. Rash Behary Ghosh and Babu Hari Ohurn Sarkhel for the petitioner.

Dr. Ashutosh Mookerjee and Babu Jnanendra Nath Bose for the opposite party.

BANKER AND GRIFF JJ. This is a Rule calling upon the opposite party, who was the plaintiff in the Court below, to show cause why the decree of the Court below in his favour should not be set aside; and the grounds upon which we are asked to set aside the decree of the Court below are as follows, namely, *first*, that the Court below was wrong in decreeing the plaintiff's claim for commission when the plaintiff failed to complete the loan transaction for the negotiation of which commission had been agreed to be paid, and, *secondly*, that the Court below was wrong in decreeing the plaintiff's claim without coming to any finding as to whether there was any real defect in the defendant's title, for which the transaction is said to have fallen through.

Now, the contract upon which the claim is based runs as follows:—"I hereby authorize you to negotiate as broker for a loan of Rs. 18,000 only on the first mortgage of three properties, namely, Nos. 31 and 40, Tangra Road, in the suburbs, and No. 27-3, Ram Kanto Mistry's Lane, in the town of Calcutta." And then the document goes on and adds:—"I hereby agree to pay you brokerage at the rate of 4½ per cent. for negotiating such loan."

It is argued by the learned vakil for the petitioner that the plaintiff was entitled to the commission agreed to be paid only, if he successfully negotiated the loan, that is, actually secured the

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advance of it to the petitioner, and that, as he failed to do so, he is not entitled to succeed upon the contract.

Now, this is how the facts found stand. The learned Judge in the Court below says:—"The plaintiff was entrusted to negotiate a loan. He did bring a creditor, who was willing and actually placed money in the hands of the attorney. The defendant was bound to satisfy the lender as to his titles, but the attorney found out certain defects and the transaction fell through. The fault was not the plaintiff's. He performed his part when he brought in a creditor willing to lend on the terms stated in Exhibit I and earned his brokerage." And a little further on he adds:—"Whether the attorney was right in his opinion I am not called upon to say. But one title-deed was missing, and he was at least right in calling upon the defendant to make it good."

Upon these findings we think it is clear that the plaintiff has performed his part of the contract, and, if the transaction fell through, it was by reason of the defendant's inability to satisfy the intending lender as to his title to the property.

Reliance was placed in the argument for the petitioner upon the cases of *Prickett v. Badger*(1) and *Martyrose v. Courjon*(2), and paragraph 329 of Story's work on Agency was also relied upon as showing that an agent must complete the thing required of him before he is entitled to charge for it "and that an agent may be entitled to a remuneration for his services in proportion to what he has done, where the entire performance is prevented by the act or neglect of the principal himself." We are of opinion that the authority of *Prickett v. Badger*(1) is at least considerably shaken by the subsequent case of *Green v. Lucas*(3), in which in the Court of Appeal the Lord Chancellor said:—"It appears to me that the plaintiffs had done everything which agents of this kind of work are bound to do, and it would be forcing their liability, if they were to be held answerable for what happened afterwards. If the contract afterwards were to go off from the caprice of the lender or from the infirmity in the title, it would

(1) (1856) 1 C. B. (N. S.) 296.      (2) (1889) 3 C. W. N. CLXXVIII.  
 (3) (1875) 33 L. T. (N. S.) 584.

be immaterial to the plaintiffs, and that appears to be the understanding of the persons themselves.

The case of *Martyrose v. Courjon*(1), in which *Prickett v. Badger*(2) was followed, is based upon the circumstances of that case, as the report in the short notes shows, but what those circumstances were the report does not set forth, and we do not think, therefore, that it would be a safe guide for us to follow in this case. As for the passage cited from Story on Agency, no exception can be taken to the rule therein laid down so far as it requires that an agent must complete the thing required of him before he is entitled to charge for it, but in the present case we are of opinion that the agent did complete what was required of him, that is to say, that he did fully perform his part of the contract, that being to negotiate for a loan for the required amount on the first mortgage of certain properties named. The plaintiff had found a lender, who was ready and willing to lend the required amount and was found to have placed the money in the hands of the common attorney of both parties; and if the transaction was not completed, it was by reason of the inability of the defendant to satisfy the attorney on the question of title, a certain document of title being found missing, by reason of which, as the evidence shows, the attorney was led to doubt whether the property had not been equitably mortgaged before. Now, the contract upon which the suit is based expressly stated that the loan was to be secured on the first mortgage of the properties named, which clearly implies a guarantee that the properties were not encumbered, and if the principal failed to satisfy the intending lender on this point, it was no fault of the agent.

We are therefore of opinion that the plaintiff in this case has fully made out his title to the remuneration claimed. It was then argued—and this was the second ground upon which we were asked to interfere—that the mere circumstance of the attorney not being satisfied on the question of title was not enough to shew that the transaction fell through by reason of any real defect in the title of the principal, and that the Court below

(1) (1889) 8 C. W. N. CLXXVIII.

(2) (1856) 1 C. B. (N. S.) 296.

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should not have decreed the claim without coming to an affirmative finding on that point. But it was very fairly conceded that the circumstances were enough to justify the attorney in advising the lender not to advance the loan, as it was not made out as between the borrower and the lender that the mortgage was to be the first mortgage on the property. Well, if that was so as between the lender and the borrower, there is no reason why the broker should be held bound to prove more, regard being had to the terms of the agreement between him and his principal.

The grounds urged before us must therefore fail, and this Rule must be discharged with costs.

*Rule discharged.*

S. C. G.



## APPELLATE CIVIL.

ISWAR CHUNDER SANTRA

v.

SATISH CHUNDER GIRI.\*

1902

December 2.

*Principal and agent—Tenant—Suit Damages—Second appeal, ground of, erroneous view of evidence.*

Because a person is the sole recorded tenant in the landlord's *sherista* he is not therefore alone entitled to sue third parties for damages done to the tenure, if other persons are also interested in and have a right to the same.

An erroneous view of evidence involves an error of law.

A master or principal is liable for wrong done to third parties by his servant or agent, provided that the act is done on his behalf and with the intention of serving his purposes.

THE plaintiff, Iswar Chunder Santra, and on his death his legal representative, Bama Charan Santra, appealed to the High Court.

This appeal arose out of an action brought by the plaintiff to recover damages for injury done to his crops by the erection of a *bandh* by the defendants Nos. 1 and 2 and to obtain a perpetual injunction restraining them from constructing similar *bandhs* in future. The defence, *inter alia*, was that the plaintiff, not being entitled to the entire 16 annas of the crops in dispute, could not sue alone, and that the defendant No. 1, the master of defendant No. 2, was not liable for any damages at all.

The Court of first instance gave the plaintiff a decree for the entire 16 annas against defendant No. 2 alone. On appeal the learned Subordinate Judge of Hooghly affirmed the decision of the first Court as regards the non-liability of defendant No. 1, and modified it by giving the plaintiff only one-seventh of the amount of damages proved, inasmuch as he had six other brothers, who had interest in the lands in suit.

\* Appeals from Appellate Decrees No. 541 of 1900 and No. 833 of 1900, against the decree of Babu Mohim Chunder Ghose, Subordinate Judge of Hooghly, dated the 19th of January 1900, modifying the decree of Babu A. C. Mitter, Munsif of Serampore, dated the 14th of June 1899.

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*Babu Mahendra Nath Ray* for the appellant. The plaintiff, as the registered tenant of the holding, was entitled to sue alone, especially as his alleged co-sharers disclaimed all interest in the holding either before or after suit. See *Jeo Lal Singh v. Gunga Pershad*(1) and *Nitayi Behari Saha v. Hari Govinda Saha*(2). Further, the Lower Appellate Court erred in holding that the defendant No. 1 was not liable. The reasons given for this finding, viz., (1) that there was nothing to show that the defendant No. 1 gave the order to the defendant No. 2 to construct the *bandh*, or that he knowingly allowed the latter to do so; (2) that there was nothing to show that the defendant No. 2 had authority to construct the *bandh* on behalf of his master; and (3) that the principal is liable for his agent's acts only when they come within the scope of his agency, and that there was nothing to show that the acts complained of were of such a description—are erroneous. It is submitted that the true principle is that the master was liable even for wilful and deliberate wrongs committed by the servant, provided they were done on the master's account and for his purpose. See *Bombay-Burmah Trading Corporation v. Mirza Mahomed Ally*(3); *Simpus v. London General Omnibus Company*(4), and *Pollock on Torts*, pp. 82—91. Besides the defendant No. 1 in his written statement did not repudiate the acts of his agent.

*Babu Sharoda Charan Mitra* for the respondents. The disclaimer of the co-sharers of the plaintiff was subsequent to the institution of the suit, and could not give him a title. Further, the question as to the liability of the defendant No. 1 was concluded by the findings of fact arrived at by the Lower Appellate Court. The *gomasta* was a merely collecting agent, and it was found that the act complained of did not come within the scope of his agency.

*Babu Mahendra Nath Ray* in reply.

**BANNERJEE AND GRINDT JJ.** These appeals, Nos. 541 and 833 of 1900, arise out of a suit brought by the plaintiff, appellant, to recover damages for injury done to his crops by the erection of a

(1) (1884) I. L. R. 10 Calc. 996.

(2) (1899) I. L. R. 26 Calc. 677, 691.

(3) (1878) I. L. R. 4 Calc. 116, 121.

(4) (1862) 32 L. J. Ex. 34.

*bandh* by the defendants Nos. 1 and 2 and to obtain an injunction restraining the defendants from constructing similar *bandhs* in future.

The defence, amongst other matters not necessary for us now to consider, raised these two questions, namely, *first*, whether the plaintiff was entitled to the entire 16 *annas* of the crops in dispute, and therefore to the entire amount of the damages claimed, and, *secondly*, whether the defendant No. 1 was liable for any damages at all.

The first Court determined the first point in favour of the plaintiff and the second against him.

Against this decision of the first Court both the plaintiff and the defendant No. 2 preferred appeals; and the Lower Appellate Court, whilst affirming the decision of the first Court upon the question of the liability of the defendant No. 1, has modified that decision on the other point, and given the plaintiff a decree for only one-seventh of the amount of damages proved.

In second appeal it is contended on behalf of the plaintiff, appellant, *first*, that the Lower Appellate Court is wrong in decreeing damages only to the extent of one-seventh of the amount of damages proved, and, *secondly*, that it is wrong in exonerating the defendant No. 1 from liability.

Upon the first point the facts found by the Lower Appellate Court are thus stated in its judgment: \* \* "It is proved by evidence that the plaintiff had six other brothers, who had interest in the lands in suit, or, in other words, were tenants in common with the plaintiff, and that the widows and sons of such other brothers are living." And, after stating these facts, the Subordinate Judge says:—"The plaintiff hence has but a  $\frac{1}{7}$  (one-seventh) share in the lands, and, as such, he is not entitled to recover the whole amount of damage claimed by him." And then he observes that the Munsif has taken a wrong view of the case in thinking that the plaintiff had sued as *karta* of the family, and the learned Subordinate Judge adds: "The plaintiff has not produced any authority to sue on behalf of his other co-sharers, and the deposition of his two nephews disclaiming interest in the lands subsequent to the institution of the suit cannot confer full title to the plaintiff in such lands and crops."

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It is argued by the learned vakil for the appellant that the view taken by the Lower Appellate Court is wrong—*first*, because it ought to have held that the plaintiff as registered tenant in the landlord's *sherista* was the only person entitled to sue in respect of damages done to the tenure or holding, and, *secondly*, because the Lower Appellate Court is wrong in holding that the depositions of the two nephews amount only to a disclaimer of interest subsequent to the institution of the suit, when their statements are evidence of a pre-existing right in the plaintiff.

We are of opinion that the first branch of this contention is incorrect, because the mere fact of the plaintiff being the sole recorded tenant in the landlord's *sherista* does not entitle him alone to sue third parties for damages done to the tenure or holding, if other persons are also interested in and have a right to the same.

But we are of opinion that the second branch of the contention is correct, and that the depositions of the plaintiff's two nephews amount to a great deal more than a disclaimer of interest in the land subsequent to the institution of the suit. They are evidence bearing upon the question whether the plaintiff is or is not the person alone entitled to the lands and to the crops in dispute. As the Lower Appellate Court in coming to a finding on that point has taken a clearly erroneous view of the evidence, and that erroneous view involves an error of law—in other words, as the learned Subordinate Judge in the Court of appeal below has omitted to consider an important portion of the evidence bearing upon the question of the plaintiff's title, his decision upon this point must be set aside and the case remanded for a fresh decision upon the evidence taken as a whole.

Upon the second question raised in this appeal, namely, whether the defendant No. 1 is liable for the damages claimed, the Lower Appellate Court in its judgment observes: "True the defendant No. 2 is a *gomasta* under the defendant No. 1, but there is nothing to show that the defendant No. 1 gave the order to construct the *bandh* or that knowingly he allowed his *karpurdazes* to do the same. Then there is no evidence to substantiate that the defendant No. 2 had authority to construct the *bandh* on behalf of his master, so as to bind him by his acts. A principal

is liable for his agent's acts only when such acts come within the scope of his agency, but in this case there is nothing to show that the acts of the defendant No. 2 were of such a description. "

The learned vakil for the appellant contends that this is not a correct way of dealing with the question of a principal's or master's liability for the acts of his agent or servant. The judgment may be correct so far as it goes ; but the contention is that it does not go far enough, and that it omits to consider all the grounds upon which a principal or master may be liable for the acts of his agent or servant. The general rule, as Mr. Justice Wills observes in the case of *Barwick v. English Joint Stock Bank*(1), is "that a master is answerable for every such wrong of his servant or agent as is committed in the course of the service and for his master's benefit." And the injury in respect of which a master becomes subject to this kind of vicarious liability has been well put by Pollock in his work on the Law of Torts, 6th edition, page 82. It may be caused in the following ways: "(a) It may be the natural consequence of something being done by a servant with ordinary care in execution of the master's specific orders. (b) It may be due to the servant's want of care in carrying on the work or business in which he is employed. (c) The servant's wrong may consist in excess or mistaken execution of a lawful authority. (d) It may even be a wilful wrong, such as assault, provided the act is done on the master's behalf and with the intention of serving his purposes."

Although the learned Subordinate Judge's judgment may be viewed as containing findings of fact, which will take the case out of head (a) and perhaps also out of (b), it is clear that he has not considered the case at all with respect to head (d). We reserve our opinion upon the somewhat broader proposition which the learned author considers later on, at page 95, in discussing head (d)—the proposition, namely, that the master will be liable, even though the act was done in contravention of his express prohibition, a question which does not arise in this case; but we think that a master or principal is clearly liable for any wrong done, provided the act is done on his behalf and with the intention

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(1) (1867) L. R. 2 Ex. 259.

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of serving his purposes. As the question has not been considered by the Court of Appeal below from this point of view, its judgment on the question of the liability of the defendant No. 1 must also be set aside and the case remanded that it may determine the point upon the evidence on the record. We may observe in this connection that the defendant No. 1 in his written statement said nothing to repudiate his connection with the acts of the defendant No. 2 so far as the *bandh* in dispute is concerned, but, on the other hand, alleged that the *bandh* had been in existence from before, and claimed the benefit of the existence of the *bandh*.

The Court of Appeal below, in dealing with the question of the liability of the defendant No. 1, will take this part of his written statement into consideration.

The costs will abide the result.

S. C. G.

*Appeal allowed.*

*Case remanded.*

## RAJ NARAIN MITTER

v.

## PANNA CHAND SINGH.\*

1902

December 8.

*Arrears of rent, suit for—Interest, rate of, specified in darpatni lease—Sale—Purchaser—Darpatni lease.*

An auction-purchaser of a *darpatni* tenure is bound by the stipulation contained in the *darpatni* lease as to the payment of interest on arrears of rent, such a stipulation, where there is nothing unusual in it, being part of the ordinary incidents of a tenure.

*Alim v. Satis Chandra Chaturdhuri* (1) and *Kali Nath Sen v. Trailokhya Nath Roy* (2) distinguished.

The landlord, decree-holder, is debarred from claiming an amount not mentioned in the sale proclamation.

*Seemle*—Whether a stipulation in the lease to pay a certain sum of money in default of the lessee's supplying the landlord with certain articles is an ordinary incident of a *darpatni* tenure.

THE plaintiffs, Raj Narain Mitter and others, appealed to the High Court.

This appeal arose out of a suit for arrears of rent against the auction-purchaser of a *darpatni* tenure. The allegation of the plaintiffs was that on the 27th Bhadra 1286 (B. S.), one Bhairab Chunder Maiti executed a Registered *kabuliat* in the names of plaintiff No. 1 and his brother, and obtained a *darpa'ni* settlement of *taluk Hetamchak* for an annual *jama* of Rs. 1,009. It had been stipulated that the rent would be paid every year in two instalments. It was also agreed that, if the rent was not paid according to the instalment, then interest at the rate of Rs. 2-8 per month would run on the said amount. It had further been stipulated that two maunds of sugarcane molasses, which the *patnidar* used to get every year from the tenants, should be paid

\* Appeal from Appellate Decree No. 884 of 1900, against the decree of H. R. H. Cox, Esq., District Judge of Hooghly, dated the 26th February 1900, modifying the decree of Babu Mohim Chunder Ghose, Subordinate Judge, dated the 19th of August 1899.

(1) (1896) I. L. R. 24 Calc. 37.

(2) (1899) I. L. R. 26 Calc. 315.

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by the *darpatnidar*, failing which he shall pay Rs. 10 in cash, the value thereof. On the death of the aforesaid Bhairab Chunder Maiti, his heir did not pay the *jama* according to the stipulation mentioned in the *kabuliat*. The vendors of plaintiffs Nos. 1 and 2 jointly obtained a rent-decree and sold the *darpatni* mehal in arrear, which was purchased by the defendant on the 26th November 1896, and he obtained possession through the Court. The defendant did not abide by the terms of the aforesaid *kabuliat* and allowed arrears to accrue, and hence the suit. The defendant pleaded that he was not liable to pay the price of the molasses and interest at the rate claimed by the plaintiffs, and that the claim in respect of certain years was barred by limitation. The Court of first instance overruled the objections of the defendant and decreed the plaintiffs' suit. On appeal to the learned District Judge of Hooghly, the decision of the first Court was reversed.

Babu Shib Chunder Palit for the appellants.

Babu Sarada Churn Mitter and *Babu Hemendra Nath Sen* for the respondent.

BANNERJEE AND GHIDY JJ. In this appeal, which arises out of a suit for arrears of rent against the auction-purchaser of a *darpatni* tenure, two questions arise for consideration— *first*, whether the auction-purchaser is bound by the clause in the *darpatni* lease stipulating for payment of interest on the arrears of rent at the rate of Rs. 30 per cent. per annum, and, *secondly*, whether the auction-purchaser is bound by the clause in the *darpatni* lease stipulating for payment of Rs. 10 annually in the event of default in supplying the landlord with a certain quantity of molasses.

The first Court answered these two questions in favour of the plaintiffs, but the Lower Appellate Court has answered them adversely to the plaintiffs. Hence this second appeal by the plaintiffs.

With regard to the first question, the learned Judge in the Court of Appeal below observes:—"It certainly seems to me that it would be most unjust to allow the plaintiffs to demand this exorbitant rate of interest from the defendant after making no mention of it in the advertisement in which everything material

for the purchaser to know in order to judge of the value of the property must be entered." In other words, the learned Judge was of opinion that as the rate of interest claimed is exorbitant, and as no mention of it was made in the sale proclamation, the plaintiffs cannot claim it.

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The learned vakeel for the appellants contends that this view is wrong in law, and that the auction-purchaser is bound by the stipulation contained in the *darpatni* lease as to the payment of interest on arrears of rent, such a stipulation being part of the ordinary incidents of a tenure.

We are of opinion that this contention is correct.

It is argued on the other side that the judgment of the Court of Appeal below is not only right so far as it goes, but that the view of the learned Judge below can also be supported on another ground, namely, that the stipulation for payment of interest on arrears of rent, if it is of an unusual character, does not form part of the incidents of a tenure. It is also argued for the respondent that upon a sale of an under-tenure for arrears, a new tenancy is created as between the decree-holder and the auction-purchaser, the incidents of which may not necessarily be those of the original under-tenure.

We are unable to accept these arguments as sound. We think that a stipulation for payment of interest upon arrears is an ordinary incident of a tenancy in this country, unless there is something unusual in the stipulation, and that, as a rule, it attaches to the tenancy so that a purchaser of the tenancy will also be bound by the stipulation. Nor can it be said that the rate of interest in this case is of itself a thing so unusual in the stipulation as to take it out of the operation of the above rule.

As to the ground upon which the learned Judge has based his decision, we do not think that the landlord, decree-holder, was under any obligation to specify the rate of interest in the proclamation of sale. There is nothing in the Bengal Tenancy Act or the Code of Civil Procedure, section 287, throwing that obligation upon him. In the sale proclamation the rent decree is referred to; and the decree reciting the claim shows that a large amount was claimed as interest and was allowed, though the rate of interest is not specifically mentioned.

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Nor can it be said that the sale of the tenancy involves any new contract between the auction-purchaser and the landlord. At the date of the sale what is sold is the original under-tenure, and it therefore carries with it all its incidents. Certain cases were cited by the learned vakeel for the respondent in support of his contention. With regard to the first of these, namely, that of *Atim v. Satis Chandra Chaturdhurin*(1), we would observe that it is distinguishable from the present case in more respects than one. In the first place, that was a case of a *raiya* holding in respect of which a contract for payment of interest on arrears of rent is controlled by section 178 of the Bengal Tenancy Act, and not of a permanent tenure in respect of which such a contract is not so controlled (see section 179 of the Act), and, in the next place, the document creating the tenancy in that case was one for a term of seven years, which had expired, and the contention of the claimant for interest was that as there was a holding-over, the terms of the original *habliah* should attach to the same, and this contention the Court refused to accept. The next case cited was the case of *Kali Nath Sen v. Trailokhya Nath Roy*(2): that also was a case of a *raiya* holding and not of an *under-tenure*, and the stipulation for interest in that case was held to be not only of an unusual, but of an unconscionable nature. As for the view taken in that case by one member of the Bench, that upon a sale of a holding for arrears of rent a new tenancy should be deemed to be created, that was the opinion of a single Judge, and, with all respect for his opinion, we cannot concur in it.

The claim for interest at the rate stipulated in the *habliah* ought therefore in our opinion to be allowed; and the decree of the Lower Appellate Court, so far as it disallowed that claim, must be set aside.

Upon the second question, however, we are unable to give effect to the appellants' contention. The rent mentioned in the sale proclamation is Rs. 1,009 and not Rs. 1,019, as it would have been, if the Rs. 10 in dispute had been included in the rent. This is no case of an omission to state what was not necessary, but is a case of positive statement of the

(1) (1896) I. L. R. 24 Calc. 37.

(2) (1899) I. L. R. 26 Calc. 315.

rent, which it was necessary for the decree-holder to state in the sale proclamation, and that being so we think that the Judge below is right in holding that the decree-holder is now debarred from asking for more. There is, moreover, an obvious reason why this part of the plaintiffs' claim was not included in the rent. The stipulation in the *darpatni* lease for the payment of the sum of Rs. 10 is a peculiar one. It is nowhere stipulated for as being part of the rent. It is not included in either of the two instalments in which the rent is specified to be paid in the lease. It is a mere undertaking on the part of the lessee to pay this sum in default of delivery to the landlord of a certain quantity of molasses, which the landlord had been hitherto receiving from the *raiyats* in the mehal. It is very doubtful, therefore, whether a stipulation like this should be considered as an ordinary incident of a *darpatni* tenure. It may well be held to have been a personal covenant by the lessee, by whom the *darpatni* was taken.

We therefore affirm that part of the judgment of the Lower Appellate Court, which disallows this claim for Rs. 10.

The result is that the decree of the Lower Appellate Court will be modified by allowing the plaintiffs' claim for interest at Rs. 30 per cent. per annum on the arrears of rent, the amount of rent being held to be Rs. 1,009.

The parties will pay and recover costs in proportion.

Decree modified.

S. C. G.

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APPEAL FROM ORIGINAL CIVIL.

TINCOWRY DEY

v.

FAKIR CHAND DEY.*

1902

November 28,
Dec. 1, 22.

Civil Procedure Code (Act XIV of 1882) ss. 375, 506 and 523—Arbitrator—Agreement to refer to arbitrator—Suit—Adjustment of suit within the meaning of s. 375—Agreement not in writing.

Where a party to an agreement has petitioned to refer matters in dispute to arbitration:

Held, that the Court has no power to make a decree under s. 375 "that the agreement to refer to arbitration be recorded, and that in terms of the said agreement the suit be referred to an arbitrator with all such powers and authorities as are vested in arbitrators under the provisions of the Civil Procedure Code, and that the arbitration be finished within six months from the date on which the decree shall be completed and filed, and that the records of the suit be delivered over to the arbitrator."

Such a decree is in the nature of an order under Chapter XXXVII of the Code.

Where an agreement to refer to arbitration is not in writing, s. 523 does not apply, neither does this section apply to an agreement to refer to arbitration in a pending suit.

Ghulam Khan v. Muhammad Hassan(1) referred to.

Hariyalabdas Kallindas v. Utamchand Manekchand(2) doubted.

Per MACLEAN C. J. A mere agreement to refer to arbitration is not an adjustment of the suit within the meaning of s. 375: under such section the subject-matter of the suit must be adjusted by the agreement.

Pragdas Sagarmall v. Girdhardas Mathuradas(3) distinguished.

Per HILL AND STEVENS JJ. *Quare*. Whether an agreement to refer to arbitration could under no circumstances be treated as an adjustment of the suit, as contemplated by s. 375.

APPEAL by the defendant, Fakir Chand Dey, against the order of Sale J.

The plaintiff, Tincowry Dey, on the 12th of July 1895, instituted a suit against the defendants, Fakir Chand Dey, Protap

* Appeal from Original Civil No. 9 of 1902 in suit No. 410 of 1895.

Appellate Bench: Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Hill and Mr. Justice Stevens.

(1) (1902) I. L. R. 29 Calc. 167.

(2) (1883) I. L. R. 4 Bom. 1.

(3) (1902) I. L. R. 26 Bom. 76.

Chunder Dey and Prohlad Chunder Pal, asking for the dissolution of the partnership firm of Fakir Chand Dey and for the taking of the partnership accounts.

On the 25th of August 1896 a preliminary decree was made, declaring the partnership to be dissolved from the 12th of June 1895, and directing certain partnership accounts to be taken. The order of reference directed Fakir Chand Dey to be the accounting party and to file his accounts.

On the 8th of September 1898, the order referring the accounts to the Second Assistant Registrar was by consent superseded, and the accounts were referred to the arbitration of Kedar Nath Dutt.

On the 19th of November 1900, Fakir Chand Dey brought a suit against Protap Chunder Dey and Prohlad Chunder Pal for the recovery of Rs. 12,255 alleged to have been deposited with the defendants.

On the 10th of January 1901, the order of the 8th of September was again superseded, and the accounts directed by the decree in the partnership suit were referred to the Second Assistant Registrar of this Court.

On the 7th of May 1901, Fakir Chand Dey filed his accounts, to which various objections were taken by his partners.

On the 21st of June 1901, a consent decree was passed in the suit brought by Fakir Chand Dey, but Tincowry Dey, the plaintiff in the partnership suit, was not made a party. By this decree the defendants were to pay Rs. 11,651 with interest to the plaintiff, Fakir Chand Dey, but the execution of the decree was to be stayed pending the final determination of the partnership suit, which the parties had agreed to refer to the arbitration of one Kally Krishna Dhur, and the arbitration was to be concluded within six months from the date of the decree. Subsequently Tincowry Dey became a party to the arbitration proceedings. A great deal of correspondence then ensued between the attorneys for the parties upon the matter of the arbitration, and finally the defendant, Prohlad Chunder Pal, presented a petition to the Court on the 26th of August 1901, asking for an order that the matters in dispute between the parties be referred to the arbitration of one Kally Kristo Dhur, and that the defendant, Fakir Chand Dey,

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should furnish to the arbitrator the accounts of the partnership business within a week from the date of the order, and that the arbitrator should make his award within six months from the date of the order.

This application came before Mr. Justice Sale on the 2nd September 1901, who, after stating the above facts, observed as follows:—

SALE J. The first question is whether the agreement is one that is binding on Fakir Chand Dey.

No case is made of misapprehension or mistake of facts, but it is said on behalf of Fakir Chand Dey that he was not aware that Kally Kristo Dhur was a broker employed by the other parties to the suit, and he suggests that the arbitrator is not wholly unbiassed; and that, if he had known this fact, he would not have consented to refer the accounts to his arbitration. On the affidavits and other materials before me, I am bound to say that I do not think that the objection which Fakir Chand Dey takes to this arbitration is “really *bona fide*.” It appears from the lengthy correspondence that Fakir Chand Dey was putting forward excuses of a flimsy character for not proceeding with the arbitration, and that he had no substantial ground of objection to make to the character of the arbitrator, Kally Kristo Dhur.

So far as the charge of bias is concerned, which he now seeks to put forward, the only ground alleged by Fakir Chand Dey is his impression that the arbitrator would not charge fees. He does not say how he came to entertain this impression or that it was created by any representation by the other defendants. It can hardly be expected that the arbitrator would undertake the arbitration without reasonable remuneration for his trouble and labour, and I quite fail to see how it is that Fakir Chand Dey never discovered during the whole time that he was raising objections to the arbitration that the arbitrator was likely to be biassed in favour of the other parties to this suit.

The evidence, so far as it has been placed before me, satisfies me that the objection taken to the arbitration of Kally Kristo Dhur is only an attempt on the part of Fakir Chand Dey to delay and defeat the arbitration, which he has agreed to.

I find that there is a valid and binding agreement between the parties to refer the matters in dispute to the arbitration of Kally Kristo Dhur, and Fakir Chand Dey has shown no cause for withdrawing from the agreement.

The next question is as to how this agreement can be carried out—whether by means of any provisions of the Code of Civil Procedure, or the Arbitration Act, or by a regular suit.

Section 51 of the Specific Relief Act disposes of the suggestion that the agreement might be carried out by a regular suit. As I read the section, no agreement referring matters to arbitration can be enforced by a regular suit.

The next question is whether a proceeding under the Arbitration Act is the proper mode of procedure. I think it is not. I think the Arbitration Act

contemplates an arbitration in respect of matters not the subject-matter of any pending suit.

The next question is whether the provisions of the Civil Procedure Code supply the proper procedure to be adopted for the enforcement of the arbitration agreement.

Reference has been made to several sections in Part V of Chapter 37, Civil Procedure Code, headed "Reference to arbitration," and the two sections in that chapter which have any bearing are sections 506 and 528. The terms of section 506 are—"If all the parties to a suit desire that any matter in difference between them in the suit be referred to arbitration, they may at any time before judgment is pronounced apply in person or by their respective pleaders specially authorised in writing in this behalf to the Court for an order of reference."

To my mind that section contemplates an application to this Court in which all the parties join as applicants or parties consenting to the application. There is no provision made for giving an opportunity to an objecting party to be heard.

Section 528 distinctly contemplates the possibility of one of the parties resisting the order of reference, because provision is made in the first place for the application being by the parties to the agreement or any of them.

In the next place, provision is made for notice to the opposite party to show cause within the time specified in the notice, why the agreement should not be filed. No such procedure as that is provided by section 506. It appears to me that section 506 contemplates consent proceedings, and this is borne out by the fact that the practice in this Court has been to entertain under section 506 merely consent applications. I do not know of any case in which an order of reference was made under section 506 or section 508 where any party to the agreement has objected, nor has learned Counsel been able to refer me to any instance of that sort.

As regards section 528, there is this admitted difficulty that that section contemplates that the agreement in writing to refer to arbitration is an agreement between all the parties.

It is admitted in this case that all the parties to the present agreement have not agreed in writing, inasmuch as Tincowry Dey, the plaintiff in the partnership suit, is no party to the agreement to refer this matter to the arbitration of Kally Kristo Dhur.

The mere fact that the matters referred to the arbitration of Kally Krishna Dhur is also the subject-matter of a pending suit does not prevent this section from being applicable.

The case of *Harivalabdas Kallindas v. Utamchand Manekchand*(1) seems to be authority for that proposition.

The next question is, if none of the sections under Part V of the Code apply, the applicant excluded from the benefit of any other provisions of the Code?

There is nothing in the Code which necessitates that an application for reference of an agreement to arbitration should only be made under Chapter 37.

The applicant contends that, in the event of Chapter 37 being inapplicable, he is entitled to take advantage of section 375, treating an agreement to refer accounts to the arbitration of Kally Kristo Dhur as a compromise or at all events partial adjustment of the suit.

(1) (4888) I. L. R. 4 Bom. 1.

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That section runs as follows :—

“If a suit be adjusted wholly or in part by any lawful agreement or compromise, or if the defendants satisfy the plaintiff in respect to the whole or any part of the matter of the suit, such agreement, compromise or satisfaction shall be recorded, and the Court shall pass a decree in accordance therewith, so far as it relates to the suit, and such decree shall be final so far as relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise or satisfaction.”

It appears to me that an agreement to refer matters in dispute in a pending suits to arbitration may justly be regarded as an adjustment or partial adjustment of matters in dispute in the suit.

It is suggested there are expressions in the section which show that it is not contemplated that an agreement of reference to arbitration should be dealt with under this section.

This appears to me not a necessary inference of the words of the section. I think if there had been a final decree in the suit, probably section 375 would not apply. But in this case there has been no final decree—only a preliminary decree to take accounts.

It is further contended that the decree contemplated by the section as made on a compromise or adjustment is a final decree. It is to be observed that the word “final” is restricted in its application to only so much of the subject-matter of the suit as is dealt with by the agreement. All that is required to be final in the present case is therefore the order of reference.”

On the whole, therefore, I see no reason why the application should not be dealt with under section 375. I propose, therefore, to make an order under section 375, recording the agreement which I have referred to and making a decree in accordance therewith in supersession of the last-mentioned order of the 10th January 1901.

On the 18th February 1902 the decree was amended as follows:—

SALE J. The question which now arises is whether the terms of the draft decree are in accordance with the judgment which directed the decree to be made upon certain terms. The judgment is dated the 2nd September 1901, and the question determined by the judgment was that the applicant was entitled to a decree in terms of a certain settlement which, it is alleged, had been come to by the parties to the suit, in which the application is made.

Various grounds of objection were taken to that application, and amongst them was an objection under section 506 of the Code that no decree could be made, inasmuch as the terms of reference to arbitration were not in writing signed by the parties thereto.

It appears that, upon the basis of the terms of settlement, a consent decree was made in the suit instituted by the first defendant, viz., Fakir Chunder Dey, and the consent decree no doubt declared that the arbitration, which I have referred to, would be concluded six months from the 21st June 1901. I am asked to say that that is the proper construction of the terms of settlement in accordance with which the decree was directed to be made, but, I think, it is quite clear that no such finding was arrived at at the hearing of the application in question. The sole point

determined being that a decree in terms of the settlement should be made, I think it is not competent to me at the present stage to determine what the true construction of the terms of settlement may be, whether the arbitration is to be an arbitration concluded in six months from the 21st June or declared in the terms of the consent decree, or whether the terms find that the arbitrator was to have six months within which to conclude his arbitration. It appears to me that the decree must be drawn up in the terms of the last paragraph but one of my judgment, which directs that the agreement, that is, terms of settlement, should be recorded and a "decree in accordance therewith in supersession of the last-mentioned order of the 10th of January 1901 be drawn up."

The result is therefore that the words in the decree "from the 21st June 1901" must be struck out. The decree must run as follows:—"And it appearing that an agreement was entered into by the parties on or before the 21st day of June 1901 whereby the parties agreed to refer this suit to the arbitration of Baboo Kally Krishna Dhur of Bara Bazar, which arbitration is to be finished within six months, it is ordered that the said agreement be recorded," and so forth.

[*Mr. Jackson.* Is it necessary to put in anything about the transmission of the records?]

The decree must be drawn up, and in terms of the decree the papers must be directed to be made over to the arbitrator.

Mr. Pugh (*Mr. Chakravarti* and *Mr. Mehta* with him) for the appellant. The serious difficulty, which arises in this case, is whether the Court has any power under s. 375 of the Civil Procedure Code. There never has been any case in which it has been held that an agreement to change a tribunal is good under s. 375 of the Code. According to law you could not enforce an agreement to refer to arbitration, but there are variations, as under s. 375. This section relates to a wholly different matter. Under the Arbitration Act you must have a written agreement by all parties, but the Lower Court wishes to enforce an oral agreement, which it cannot do. The decree is not a final decree at all. *Muhammad Zahur v. Cheda Lal*(1) cited.

The principle laid down in *Vasudeva Shanbog v. Naraina Pai*(2) covers this case. It is impossible that a decree should be final, which merely directs a suit to arbitration.

The agreement to refer to arbitration is entirely beyond the suit, and you cannot make a decree beyond the terms of the agreement in suit—*Ghulam Khan v. Muhammad Hassan*(3).

(1) (1892) I. L. R. 14 All. 141.

(2) (1878) I. L. R. 2 Mad. 256.

(3) (1902) I. L. R. 29 Calc. 167.

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In order to enforce a submission to arbitration, you must bring yourself within the special provisions given by the Legislature. You must apply to the case either Chapter XXXVII of the Code or the Arbitration Act.

The judgment of the Lower Court therefore cannot be sustained.

The Advocate-General (Mr. J. T. Woodroffe), (Mr. O'Kinealy and Mr. Sinha with him), for the respondent, Prohlad Chunder Paul. When parties agree to refer their suit to arbitration that agreement is an adjustment of the suit—*Pragdas Sagurmali v. Girdhardas Mathuradas*(1) and *Brojodurlabh Sinha v. Ramanath Ghose*(2).

In the case of *Shama Sundram Iyer v. Abdul Latif*(3), it was held that the words “shall be in writing” in s. 506 of the Code were directory.

Here three of the parties have agreed in writing to refer to arbitration, and the fourth party, it is shown, was quite willing that a reference to arbitration should take place—*Harivalabdas Kallindas v. Utamchand Manekchand*(4). S. 523 means nothing further than that there shall be an agreement in writing to refer. There is nothing in the section about signing. In the Lower Court our contention was that, if the Court did not agree that the suit came under s. 523, then our contention would be that we came under s. 375.

Mr. Dunne (with him *Mr. B. C. Mitter*) for the respondent, Protap Chunder Dey. S. 523 of the Code does not contemplate writing by all parties. Persons can agree in writing, although the agreement is signed by their agents.

I rely on two letters—one written by the attorney for the plaintiff, Tincowry Dey, which states that the parties are agreed to refer to arbitration, and the other, which shows who is the arbitrator. This is a perfect assent in writing and comes within s. 523 of the Code.

(1) (1902) I. L. R. 26 Bom. 76.

(2) (1897) I. L. R. 24 Calc. 908.

(3) (1900) I. L. R. 27 Calc. 61.

(4) (1888) I. L. R. 4 Bom. 1.

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MACLEHAY C. J. On the 12th of July 1895, one Tincowry Dey instituted a suit in this Court against Fakir Chand Dey, Protap Chunder Dey and Prohlad Chunder Pal, asking for the dissolution of the partnership firm of Fakir Chand Dey, for the taking of the partnership accounts and further consequential relief. On the 25th of August 1896, it was declared that the partnership ought to stand dissolved from the 12th of June 1895, and certain partnership accounts were directed to be taken. Fakir Chand Dey was found by the Second Assistant Registrar of this Court to be the accounting party, and he was subsequently directed to file his accounts. On the 8th of September 1898, the matters in dispute in the suit were by consent referred to the arbitration of one Babu Kedar Nath Dutt. Owing, as is alleged, to the action of Fakir Chand Dey, who would not make up the accounts, that arbitration was unable to proceed. On the 19th of November 1900, Fakir Chand Dey instituted a suit in this Court against Prohlad Chunder Pal and Protap Chunder Dey, seeking to recover the sum of Rs. 12,255, which, he said, he had deposited with the defendants. On the 10th of January 1901, the order of the 8th of September 1898 was discharged, and the accounts directed by the decree in the partnership suit were referred to the Second Assistant Registrar of this Court. In May 1901 Fakir Chand Dey filed his accounts, to which considerable objection was taken by his other partners. On the 21st of June 1901, a consent decree was passed in the suit of Fakir Chand Dey against Protap Chandra Dey and Prohlad Chunder Pal, to which, it will be noticed, the plaintiff in the partnership suit, Tincowry Dey, was not a party, and it was, amongst other things, decreed by consent that Protap Chunder Dey and Prohlad Chunder Pal should pay Rs. 11,651 odd with interest to the plaintiff, but that the execution of the decree should be stayed, until the final determination of the partnership suit, which the parties had agreed by a certain compromise and settlement to refer to the arbitration of one Kally Kristo Dhur, which arbitration was to be concluded within six months from the date of the last-mentioned decree. Tincowry was not a party to these terms of settlement; but it is reasonably clear that he subsequently came in and was willing to be a party to and to be bound by that arbitration. Fakir Chand

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Dey, it seems to me upon the evidence, tried subsequently to shuffle out of his agreement to refer the matter to the arbitration of Kally Kristo Dhur, and a long correspondence ensued between the solicitors of the parties upon this matter. Tincowry Dey, Protap Chunder Dey and Prohlad Chunder Pal insisted that the arbitration should go on, while Fakir Chand Dey was doing his best not to give effect to his agreement to refer the matter to the gentleman I have named, and I am satisfied that the action of Fakir Chand Dey in the matter was not straightforward or fair, and I regard his reasons for not accepting the gentleman named as the arbitrator as frivolous and ill-founded. Fakir Chand Dey appears to have been very successful in keeping his partners at bay in the partnership suit, for, although the suit was instituted on the 12th of July 1895, and we are now nearly in 1903, the accounts have not yet been taken.

However, on the 26th of August 1901, Prohlad Chunder Pal presented a petition to this Court, asking for an order "that the matters in dispute in this suit, including the question of costs in this suit and of the award and of obtaining judgment therein, be referred to the arbitration of Babu Kally Kristo Dhur, Twist Merchant and Broker of Burrabazar, in the town of Calcutta with all the power of an arbitrator, and that the said defendant, Fakir Chand Dey, do furnish the said Babu Kally Kristo Dhur with the accounts of the said partnership business within a week from the date of the order to be made hereon, and the said arbitrator do make his award within six months from the said date." The matter came before Mr. Justice Sale, who found that there was a valid and binding agreement between the parties to refer the matters in dispute to the arbitration of the gentleman named, and that Fakir Chand Dey had shown no cause for withdrawing from the agreement. The learned Judge found that section 21 of the Specific Relief Act did not help the applicant, that the Arbitration Act would not help him, and that the case did not fall within either section 506 or section 523 of the Code of Civil Procedure.

I agree in the conclusion which the learned Judge has arrived at upon these points, though I am not disposed to think that section 523 of the Code applies, where there is a pending suit which affects the subject-matter of the reference to arbitration. Upon

this head I may refer to the recent decision of their Lordships of the Judicial Committee of the Privy Council in the case of *Ghulam Khan v. Muhammad Hassan*(1), which seems to me to import that section 523 does not apply, where there is a pending suit. But the learned Judge, though he thought he was unable to interfere either under the Arbitration Act or the sections of the Code, to which I have referred, was of opinion that section 375 of the Code applied, and he made an order in the following terms: "It appearing that an agreement was entered into by the parties on or before the twenty-first day of June one thousand nine hundred and one whereby the parties agreed to refer this suit to the arbitration of Babu Kally Kristo Dhur of Bara-bazar, which arbitration is to be finished within six months, it is ordered that the said agreement be recorded. And it is further ordered and decreed that in terms of the said agreement, this suit be referred to the arbitration of Babu Kally Kristo Dhur of Bara Bazar with all such powers and authorities as are vested in arbitrators under the provisions of the Code of Civil Procedure, and that the said arbitration be finished within six months from the date on which this decree shall be completed and filed," and so on.

The only question that we have to decide is whether section 375 of the Code applies to the present case. Section 375 of the Code runs as follows:—"If a suit be adjusted wholly or in part by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the suit, such agreement, compromise or satisfaction shall be recorded and the Court shall pass a decree in accordance therewith, so far as it relates to the suit, and such decree shall be final so far as relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise or satisfaction." I am aware of no case in the High Courts of India where it has been held that a mere agreement to refer is an agreement within the meaning of section 375, though no doubt in the case of *Pragdas Sagarmall v. Girdhardas Mathuradas*(2), it has been held that on an agreement to refer when and after an award has been made, the

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(1) (1902) I. L. R. 29 Calc. 167.

(2) (1901) I. L. R. 26 Bom. 78.

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agreement, coupled with the award, may be treated as an agreement within the meaning of section 375. Apart from the question whether in such a case the proper course would not have been to apply under section 525 of the Code, that case is distinguishable from the present, for here the parties have not got beyond an agreement to refer and no award has been made. It is indisputable here that by his petition the petitioner does not ask for an order under section 375, and the possible application of that section would appear to have been an after-thought. It seems to me that the relief specifically asked for by the petition could, if at all, only be granted by the Court under section 523 of the Code, to which two difficulties present themselves—*first*, that Tincowry Dey could hardly be said to have agreed in writing within the meaning of that section, and, in fact, the Court below has found to the contrary, and, *secondly*, that section 523 does not apply to the case of an agreement to refer, where there is a pending litigation. Section 506 appears to apply to the case where parties have agreed to refer in a pending suit, and section 523 to the case where there is no pending litigation. At least this is the way in which I read the observations of their Lordships of the Judicial Committee in the case of *Ghulam Khan v. Muhammad Hassan*(1), to which I have already referred. It is true that a contrary view was expressed in the case of *Harivalabdas Kallindas v. Utamchand Manekechand*(2), but I doubt, if this decision can stand, having regard to the Privy Council case to which I have referred.

However, the only question we have to decide is whether the present case falls within section 375. We must look to the Code as a whole, and we find that sections 506 to 526 inclusive deal with references to arbitration as a matter of special proceeding. Those sections come after section 375, and I read those sections as laying down the procedure in the case of references to arbitration and as exhaustive upon that particular subject. In this view, as these sections deal specifically with this particular matter, the inference would be that section 375, which precedes these arbitration sections, was not intended to apply to a mere agreement to refer to arbitration. In one sense, perhaps, it may be said that the suit is adjusted by such an agreement, inasmuch as by it the whole

(1) (1902) I.L.R. 29 Calc. 167.

(2) (1879) I.L.R. 4 Bom. 1.

subject-matter of the suit is transferred to the arbitrament of another tribunal, but it is not, in my opinion, such an adjustment as is contemplated by section 375. That section appears to me to contemplate that the subject-matter of the suit must be adjusted by the agreement. This view seems to gain support from the last words of the section, viz., "such decree shall be final, so far as relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise or satisfaction."

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No part of the subject-matter of the suit is dealt with by the agreement in the present case: that is all left open to be dealt with by the arbitrator; and, if so, it is difficult to see how there can be any finality in the decree in relation to that subject-matter.

If parties agree to determine a suit and to leave the dispute to be decided by arbitration instead of by the Court, the suit can be withdrawn under section 373.

Upon these grounds, and more especially upon the ground that references to arbitration and arbitration proceedings are specially dealt with by special sections of the Code, in my opinion section 375 was not intended to apply to an agreement merely to refer a suit to arbitration. Further, I fail to see how under section 375 the Court had any power to make a decree for referring the matter to the arbitration of the gentleman named "with all such powers and authorities as are vested in arbitrators under the provisions of the Code of Civil Procedure, and that the said arbitration be finished within six months from the date" on which the said decree would be completed and filed or to order that that "decree be in supersession of the decree made in this suit and dated the twenty-fifth day of August one thousand eight hundred and ninety-six, and the orders made in this suit and dated, respectively, the eighth day of September one thousand eight hundred and ninety-eight and the tenth day of January one thousand nine hundred and one;" or to order to deliver to the arbitrator the records of the suit. The form of the decree would seem to indicate that it was regarded as one made under the arbitration sections of the Code rather than under section 375.

In my opinion this case does not fall within section 375, and the appeal must be allowed with costs. As I do not think that the

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conduct of the appellant, Fakir Chand Dey, has been straightforward in the matter, we give him no costs in the Court below.

HILL J. I agree in thinking that this appeal should be decreed, and I concur, speaking generally, in what has been said by the Chief Justice. In the view, however, which I take of the case, it seems to me unnecessary to express any definite opinion on the question whether an agreement to refer may, under any circumstances, amount to an adjustment of a suit in the sense of section 375 of the Code. The application in this case to the Court below was not, I think, made with advertence to section 375 or with a view to the adjustment of the suit within the meaning of that section. It asked in terms for an order referring the matters in dispute in the suit to arbitration, and that was the order which was made. Such an order it was not, I think, competent to the Court to make under section 375, while, for the reasons mentioned by the Chief Justice, sections 506 and 523 appear to me to be inapplicable. This being so, it seems to me that the question, to which I have referred above, does not arise. But I may add that, as at present advised, I am not prepared to hold that under no circumstances could an agreement to refer be properly treated as an adjustment of a suit such as is contemplated by section 375.

STEVENS J. I concur in the view which has been expressed by my brother Hill. I think that section 375 of the Code of Civil Procedure does not apply to the application which was made for a reference to arbitration in the present case, and that the appeal must therefore be decreed.

Attorneys for the appellant: *Bonnerji & Bonnerji.*

Attorneys for the respondent, Protap Chunder Dey: *N. N. Sen & Co.*

Attorney for the respondent, Prohlad Chunder Pal: *N. C. Bose.*

R. G. M.

PRIVY COUNCIL.

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P. C.
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July 24, 25.

29, 31.

August 1.

November 14.

[On appeal from the High Court at Fort William in Bengal.]

Hindu law—Joint family—Evidence of separation—Conduct of parties as showing intention—Decree in litigation between members creating partition—Decree ascertaining shares of individual members.

Where it was found:—

(1) that the result of former litigation had been to ascertain the shares of individuals of a Hindu family, and that, although there had been, from the nature of the property, no partition by metes and bounds, there was undoubtedly a numerical division, by which the share of each member was fixed, and

(2) that petitions by the various members under the Land Registration Act of 1876 clearly indicated individual and not joint ownership under the final decree in the litigation;

Held, looking at the conduct of the parties, in order to arrive at their intention as to separation, and at the whole circumstances of the case, that, notwithstanding the imperfect form of the decree, a separation of the joint family was established.

APPEAL from a judgment and decree (3rd February 1897) of the High Court at Calcutta modifying a decree (8th May 1895) of the Subordinate Judge of Patna.

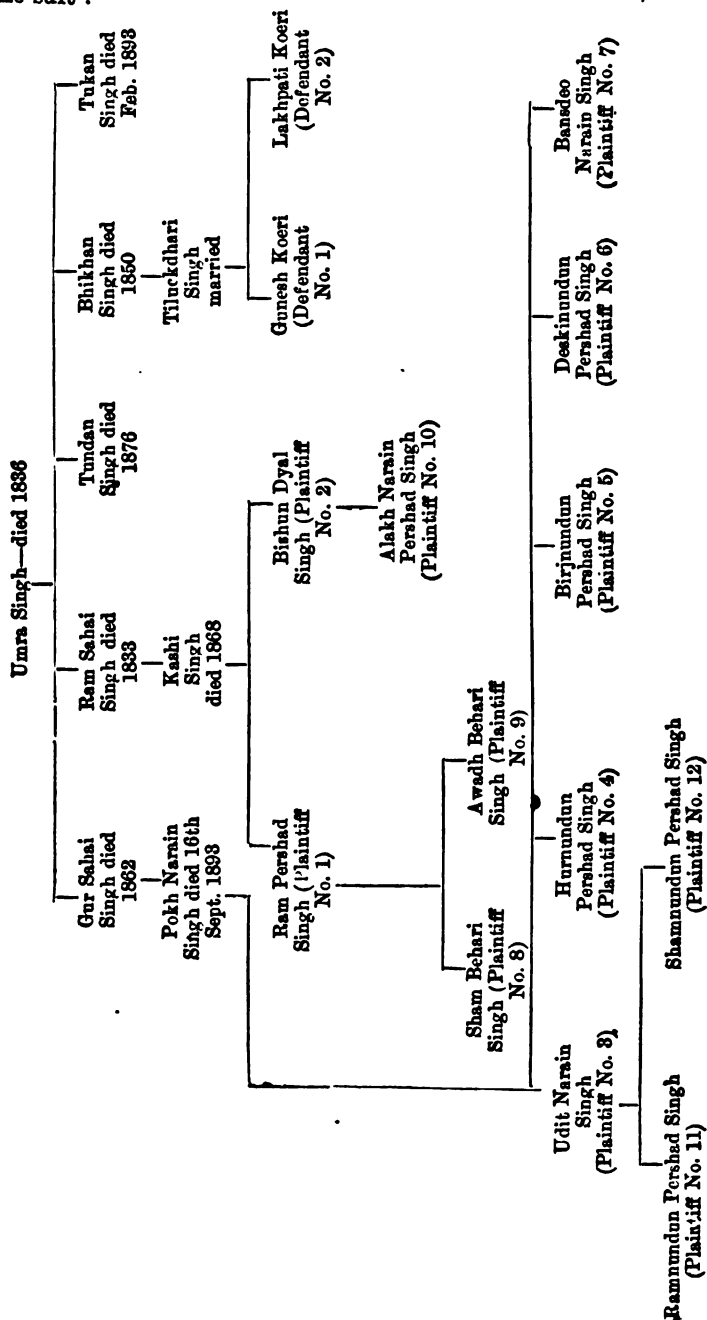
The plaintiffs, Ram Pershad Singh and others, appealed to His Majesty in Council.

The suit, out of which the appeal arose, was brought for a declaration of the plaintiffs' right to, and to recover possession of, properties left by Tiluckdhari Singh, the deceased husband of the defendants. The plaintiffs claimed by right of survivorship, alleging that at his death Tiluckdhari formed with them a member of a joint and undivided Hindu family governed by the Mitakshara law, and that consequently his widows would not be entitled to inherit the property.

* *Present*:—Lord Davey, Lord Robertson, Sir Andrew Scoble, Sir Arthur Wilson, and Sir John Bonser.

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The following pedigree explains the relationship of the parties to the suit :—



The members of this family constituted a joint undivided family, governed by the Mitakshara law to the end of the year 1861; for, although in former family litigation a separation in 1836 was alleged, it was held by the first Court (and that decision was affirmed on appeal to the High Court) that that separation was not proved.

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The circumstances and effect of that litigation are sufficiently referred to in their Lordships' judgment, as are also the circumstances leading up to the present suit, which was instituted on the 20th November 1893, Tiluckdhari having died on 15th November 1891.

The defendants in their written statement raised two main pleas. *First*, they alleged that Tiluckdhari was separate in estate and in paragraph 5 pleaded that in 1861 Gur Sahai, Tukan, Kashi, and Tiluckdhari separated, and divided all the ancestral properties, both moveable and immoveable, amongst themselves, and since then they had messed and lived separately, and had their business separate from one another. *Second*, they pleaded that the transactions, which were in the name of Tiluckdhari alone, constituted his separate and self-acquired estate.

The material issues fixed were as follows :—

" 3. Whether Tiluckdhari Singh was a member of a joint Mitakshara family with the plaintiffs at the time of his death ?

" 4. Whether there was a separation of the joint family, as described in paragraph 5 of the written statement of the defendants in 1268 F. (1861) ?

" 5. Are the plaintiffs under the circumstances disclosed in the plaint entitled by the law of survivorship to the properties left by the defendants' husband ?

" 6. Whether the properties specified in Schedules B. and C. annexed to the plaint were acquired by Tiluckdhari Singh with the aid of the joint funds of himself and of the plaintiffs.

" 7. Did the suit that was instituted by Pokh Narain Singh and others in 1868 against Tundun Singh and the decree made therein have the effect in law of creating a partition between the several members of the family ?

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"8. Were the names of the several decree-holders separately registered in the Collectorate in respect of the properties decreed? If so, what effect has such registration upon the present suit?"

The Subordinate Judge found that no absolute separation (as pleaded in paragraph 5 of the defendants' written statement) in mess and division of property took place in 1268 (1861), the evidence thereof being entirely unworthy of credit; and that a partition of ancestral property between Tiluckdhari, Pokh Narain, and Ram Pershad was not established. As to this the Subordinate Judge said:—

"On the whole I find that the defence of partition of ancestral property between Tiluckdhari, Pokh Narain, and Ram Pershad, either in 1268 F.S. or after the *dakhal-dehani*, is not established either by satisfactory oral evidence or by documentary testimony. Of course, it must be said here, that it is also urged that the decree passed in the suit against Tundun in 1868 (1275 F.) effected a legal partition; and probably taking that view of the decree plaintiffs in their plaint set up the theory of re-union. It is to be observed, however, that the effect of that decree, giving it the most liberal interpretation possible, was a severance of Tundun's and Tukan's share from the compact three-fifths share of Pokh Narain, Kashi, and Tiluckdhari; and plaintiffs' pleader quoting the cases of *Bata Krishna Naik v. Chintamani Naik*(1) and *Upendra Narain Myti v. Gopee Nath Bera*(2) argues that separation of a member does not *ipso facto* effect severance of other members *inter se* of a joint family. It needs be said here that the Privy Council case of *Cheetha v. Miheen Lall*(3) forms the *substratum* or main basis of the two precedents quoted above, and so it is undeniable that the proposition is supported by clear authority. It is needless therefore to discuss the merits of the theory of re-union that was started by plaintiffs in their plaint. In my opinion, both the theories of legal severance and of re-union set up respectively by the defendants and plaintiffs, are legal fictions concocted on a mistaken view of certain precedents, which are not at all in point to the facts of this case. This is my opinion in respect of the 4th and 7th issues; and I find in reference to the 3rd issue, that Tiluckdhari at the time of his death was separate from Pokh Narain, Ram Pershad, and Bishun Dyal in mess, worship, and residence, but not in ancestral property, though, as I shall show presently, he acquired on his account certain separate property."

The Subordinate Judge further found that Tiluckdhari most likely separated in mess after the delivery of possession in 1870; that he did not receive his supplies of food from a common storehouse, but there must have been a common store, for the servants and for other purposes, and that there was a separate worship in Tiluckdhari's house; that the books of account produced by both

(1) (1885) I. L. R. 12 Calc. 262.

(2) (1888) I. L. R. 9 Calc. 817.

(3) (1867) 11 Moore's I. A. 369.

parties were unreliable; that, although shares were specified in some of the applications for registration in the Collector's books, yet, as the names of all were jointly recorded in the books themselves, the mutation proceedings furnished no tangible criterion one way or the other as indicating jointness or separation; and that the onus lay on the plaintiffs to establish that the properties in Schedules B. and C. acquired in the name of Tiluckdhari were acquired by the use of joint funds, and that they had failed to discharge the onus.

In the result he gave the plaintiffs a decree, except as to the properties in Schedules B. and C., which were held to be the self-acquired property of Tiluckdhari.

From this decree both parties appealed to the High Court. A Divisional Bench of that Court (BEVERLEY AND AMEER ALI JJ.) was of opinion that the plaint in the suit filed in 1869 to recover from Tundan the three-fifths share jointly owned by the plaintiffs itself set out an antecedent separation in interest, which could only refer to the separation in 1861, and that a separation amongst some members of a family operated as a separation amongst all.

The material portions of their judgment were as follows:—

"As already stated, the sole question in the case is, whether at the time of his death, Tiluckdhari was joint or separate from the plaintiffs. It is not necessary, it seems to us, to consider when the separation took place, for, if he was not joint with the plaintiffs at the time of his death, they can have no right of survivorship. The determination of the time when separation took place is of importance only when the nature of any particular acquisition made by any member of a joint family during jointness or after division is in dispute. It is only when the question is, when and how or with what funds any particular property, which is claimed to be joint or separate, was purchased, that the exact time of separation becomes of importance. But where the heritage of a deceased person is claimed by survivorship, the real question to try is, whether at the time of his death, the deceased was a member of an undivided Hindu family with the persons claiming the right. But though, in our opinion, this seems to be the proper issue for determination, we shall, in the course of this judgment, consider also the evidence adduced by the defendants to prove separation as alleged by them in 1268 or thereabouts.

"It is necessary, before proceeding further, to consider the effect on the status of the family, of which Tiluckdhari is alleged to have been an undivided member, of the admitted separation of Tundan and Tukan, as well as of the decree of 1869. Counsel for the defendants contended that the separation of the two elder members involved a disruption of the status of co-parcenary, and that, if thereafter they

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are found to be living joint, it must have been on the basis of some agreement, and that consequently the presumption on which the Subordinate Judge has proceeded was not well founded. In support of this proposition he relied on the case of *Radha Churn Dass v. Kripa Sindhu Dass*(1). That case was decided by GARTH C. J. and PRINSEP J., and the Chief Justice, who delivered the judgment of the Court, observed as follows:—‘Now it is perfectly true, that for several generations back that section of the family to which both the plaintiff and the defendants belong, was undoubtedly joint; but then it is admitted on both sides that about forty years ago, a separation of that section took place, by which one member at least, Janki, the brother of the plaintiff’s adoptive father, ceased to belong to the joint family. The defendant Kripa Sindhu says that on that occasion the plaintiff and his adoptive father Kanhai Das also ceased to be members, while the plaintiff’s contention is that Janki was the only seceding member. However this may be, we think that the presumption of the continued unity of the joint family (which, undoubtedly, is the ordinary rule in these cases) cannot be applicable here, because, when once it is admitted that a disruption of the unity has taken place, it is difficult to see how any presumption can arise as to any other particular member or members having continued joint or become separate. It seems, indeed, very doubtful whether by the Hindu Law any partial partition of the family property can take place except by arrangement. Mr. Mayne in his valuable book on Hindu Law lays it down in section 416 that a partition may be partial either as regards the persons making it or the property divided; but the authorities to which he refers seem scarcely to support his proposition. One can very well understand that, as regards separation, any member or members of a family might separate from the rest at their option; a mere declaration by one member that he was separate from the others would seem to be sufficient to effect the separation. But partition of the property is a different thing, because, in order to effect a just partition, it is necessary of course to ascertain the share to which each and every member of the family is entitled, and we have not been able to find any case in the books, in which either a suit has been brought for a partial partition or a partial partition has been adversely decreed.’

“The views expressed in this case were afterwards dissented from by PRINSEP J. in *Upendra Narain Myti v. Gopi Nath Bera*(2). That learned Judge, dealing with the first point raised in the appeal before him, namely, whether the separation of one member of a joint Hindu family necessarily creates a separation between the other members and causes the general disruption of the family, expressed himself thus: ‘On the first point we have been referred to the case of *Radha Churn Dass v. Kripa Sindhu Dass*(1) as an authority for deciding it in the affirmative. On the other hand, we have considered the observations of their Lordships of the Privy Council in the case of *Rewan Persad v. Radha Beeby*(3) and *Cheetha v. Miheen Lal*(4), neither of which cases were laid before the Division Bench, which decided the case first mentioned.’ And after quoting largely from those two cases and the case of *Deen Dyal Lal v. Jugdeep Narain*

(1) (1879) I. L. R. 5 Calc. 474.

(3) (1846) 4 Moore’s I. A. 187.

(2) (1883) I. L. R. 9 Calc. 817.

(4) (1867) 11 Moore’s I. A. 369, 380.

Singh(1) he continued as follows: 'Speaking therefore for myself as one of the Judges, who decided the case of *Radha Churn Dass v. Kripa Sindhu Dass*(2), I am of opinion that the point has been definitely decided by their Lordships of the Privy Council, and had these judgments been brought to my notice, my judgment in the case of *Radha Churn Dass v. Kripa Sindhu Dass*(2) would have been otherwise. The case must therefore be remanded to the Lower Appellate Court to determine, on the merits, whether the compromise can be set aside.'

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"Now, so far as we can see, the case of *Rewan Persad v. Radha Beeby*(3) is no authority for the proposition for which it is cited in *Upendra Nath Myti v. Gopi Nath Bera*(4). There is nothing in the judgment of their Lordships to suggest that one member of a joint Hindu family may separate himself with the consent of all the members after ascertaining and obtaining his own specific share in the joint undivided estate, and yet the joint family may continue in the same state as before. It seems to us that, what their Lordships were considering in that case was not a partial division of the members, but a partial division of the joint estate, and they hold that the undivided members of a joint Hindu family may agree to take out a portion of the estate from the status of co-parcenary and hold it separately amongst themselves, whilst retaining the status as regards other property. The case of *Deendyal Singh v. Jugdeep Narain Singh*(1) is much less to the point, for in that case there was a partition *in invitum* of the members of the family. The question for determination in Deendyal's case turned upon the position of a purchaser at an execution sale of the right, title and interest of an undivided member of a Mitakshara family: and their Lordships upon equitable considerations held that he ought to have the same right of compelling partition as the debtor had, and nothing more. There was no question of an ascertainment of the share of any outgoing member with the general consent of all the members. Their Lordships' remarks are clear on this point. After referring to the case of *Sadabart Prasad Sahu v. Foolbask Koer*(5), they say as follows:—'But however nice the distinction between the rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution sale may be, it is clear that a distinction may, and in some cases does, exist between them. It is sufficient to instance the seizure and sale of a share in a trading partnership at the suit of a separate creditor of one of the partners. The partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of his co-partners, but the purchaser at the execution sale acquires the interest sold, with the right to have the partnership accounts taken in order to ascertain and realize its value. It seems to their Lordships that the same principle may and ought to be applied to shares in a joint and undivided Hindu estate, and that it may be so applied without unduly interfering with the peculiar status and right of the co-parceners in such an estate, if the rights of the purchaser at the execution sale are limited to that of compelling the partition, which his debtor might have compelled, had he been so minded, before the alienation of his share took place. In the present case their Lordships are of opinion that they ought not to interfere with the decree under appeal so far

(1) (1877) I. L. R. 3 Calc. 198.

(3) (1846) 4 Moore's I. A. 137.

(2) (1879) I. L. R. 5 Calc. 474.

(4) (1883) I. L. R. 9 Calc. 817.

(5) (1869) 3 B. L. R. F. B. 31.

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as it directs the possession of the property, all of which appears to have been finally and properly found to be joint family property, to be restored to the respondent. But they think that the decree should be varied by adding a declaration that the appellant, as purchaser at the execution sale, has acquired the share and interest of Tufani Singh in that property, and is entitled to take such proceedings, as he shall be advised, to have that share and interest ascertained by partition.'

"The facts of the case *Cheetha v. Miheen Lal*(1) were of a peculiar character. The plaintiff in that suit was the widow of one Damudar Das, who had died some eleven years before she brought her action. The family of Damudar had consisted originally of three brothers; one of them, Shama Das, had separated himself from the two others and taken his share of the ancestral estate as his separate property, and it was clearly established that the other two brothers had continued joint after the separation of Shama Das. Having regard to the evidence and the special facts of the case, their Lordships held against the widow. There was nothing to show under what circumstances or conditions the two brothers had remained joint. Nor is there anything in the judgment of the Judicial Committee to exclude the hypothesis that they continued joint under some arrangement, by which the original status was maintained intact. The view, therefore, expressed in *Upendra Narain Myti v. Gopi Nath Bera*(2) does not seem to be quite borne out by the authorities on which it is based, and the inclination of our mind is in favour of the opinion expressed by GARTH C.J. The contrary view appears to us to involve several anomalies. Suppose, for example, a Hindu, subject to the Mitakshara, dies leaving a widow and four sons: the mother would be entitled, upon a partition among the sons, to a share equal to that of the sons for her maintenance. Suppose one son were to separate himself, and take his share as his separate property, what would be the position of the widow? Would she be entitled to claim a share for her maintenance? If she can claim a share, how would it be apportioned after her death? and if not, what *would* be her right to maintenance? These and similar questions confront us at once, if it be assumed, as is the case in *Upendra Narain Myti v. Gopi Nath Bera*(2), that one member may separate, leaving the rest in their normal condition. But, if the view expressed by GARTH C.J. be the right exposition of the law, it is easy to suppose that the separation of one member may be accompanied by a contemporaneous arrangement among the others, by which they may agree to remain subject to the old conditions wholly or partially, making such provision as by mutual consent they may deem advisable for the maintenance of the mother or the widow of the late owner. In the view that we take of the present case, however, it is not necessary to express any decided opinion on the question discussed here.

"Proceeding now to the decree of 1868 we find the plaintiffs in that action suing for a declaration of their rights in, and for the recovery of their "respective shares." The passage in the plaint runs thus:—"Suit for recovery of possession after adjudication upon the rights and interest of the parties respectively in their shares in the estates from Nos. 1 to 39 and Nos. 47, 51, 52, and 53, and the mud-built houses covered with tiles and brick-built houses, comprising female apartments, covered with planks, situate in mauzah Nehusa, and for confirmation of possession

(1) (1867) 11 Moore's I. A. 369.

(2) (1868) I. L. R. 9 Calc. 317.



of the estates Nos. 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, and 54 in parganas Gyspore, Bhimpore, and Pilich, acquired at the time of joint tenancy from the *ijmali* or joint fund.'

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"The Persian words *hisss khandha* (respective shares) unequivocally indicate an antecedent separation of interest, which can only be ascribable to the disruption that took place in 1861. Reference is made both by the Subordinate Judge and learned Counsel for the plaintiffs to another passage in the plaint to show that in 1868 the parties were living joint. The passage in question runs thus:— 'Babu Umrao Singh, your petitioner's grandfather, had five sons, *viz.*, Gur Sahai Singh, Ram Sahai Singh, Tundan Singh, Bhikari Singh, and Tukan Singh. Of these, Gur Sahai, Ram Sahai, and Bhikari Singh, fathers of your petitioners, died on different dates. Your petitioners' fathers and the defendants Nos. 1 and 5 (the five full brothers) during the lifetime of Umrao Singh, the common ancestor, and also after his demise, lived jointly and in commensality; and even after the demise of Ram Sahai, Gur Sahai, and Bhakari, your petitioners themselves and defendants Nos. 1 and 5 continued to live in common for all purposes as before; and from the fund of the time of the ancestor and the profits of the ancestral estates, as also from all that had been realized from different holdings and farms, the estates of all the co-sharers in joint tenancy increased. The defendant No. 1 was entrusted with the management of the Court affairs?'

"It seems to us, however, that the argument based on these words is founded on a misconception of their significance, for the plaintiffs in that suit do not say that they are still living in commensality as a joint family. What they do say is, that in Umrao's lifetime and also after his demise, the plaintiffs and Tundan and Tukan lived jointly and in commensality, and that even after the demise of Ram Sahai, Gur Sahai and Bhikhan, they (the plaintiffs and defendants Nos. 1 and 5) 'continued to live in common for all purposes as before,' which is very different from saying that they are still living joint. That this is the correct view is confirmed by another passage towards the end of the plaint, where the then plaintiffs state as follows:—'Since the property in suit was acquired by all the parties from the profits of the ancestral estates at the time of joint tenancy and commensality of the partners, every one of them is entitled to an equal share according to the provisions of the *Shastras*.'

"The allegation as to jointness distinctly refers to an antecedent state of circumstances and not to a continuing state. It is clear upon the evidence of Bishun Dyal himself that the plaintiffs in the suit of 1868 could not have possibly meant by the words, on which reliance is placed, that the parties had been joint till then and were still joint, for he admits that Tundan separated in 1268 (1861), and that in 1272 or 1273 (1865 or 1866) Tukan separated his collections. Bishun Dyal's statements are full of contradictions and prevarications, as we shall show more fully later on; but assuming that he spoke truthfully as to the time of Tukan's separation, it would be inconsistent with the argument now put forward that the plaint shows that the parties were joint in 1868. But it is said that Gur Sahai died in 1269 or 1862, and in the plaint it is alleged that they were joint after his death; then how could separation have taken place in 1263? It is not necessary for us to reconcile all the contradictory statements made in the course of the former suit. For our present purpose

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it is enough to say that the words, to which reference has been made, do not support the contention based on them, and that the evidence shows that two of the members who, it is contended, were joint in 1838, separated some years before. The deposition of Tukan given in the certificate proceedings was admitted as evidence in this case, he having died in 1893. He swears to a general disruption when Tundan, the principal member, broke away from the joint family. His evidence is consistent with the probabilities. We shall examine later on the grounds on which he has been discredited; but it seems to us that the Subordinate Judge would have hesitated before discarding his evidence, had he not been misled by the construction put on the plaint of 1863. That suit culminated in a decree. The defendants allege that possession was taken separately by the several plaintiffs. This allegation receives some corroboration from the statement of one of the plaintiffs' witnesses named Brhama Singh, who says that possession under the decree was obtained separately, though, of course, he is confused about the property. The subsequent registration of the names separately in the Collector's records is a circumstance in favour of the conclusion that the parties had specified and distinct interest. It is true that separate registration of names for fiscal purposes by itself possesses little importance. But when that fact is considered in connection with other circumstances its probative force is by no means to be lost sight of. We may add here that we utterly disbelieve the story put forward by the plaintiffs for filing separate petitions in the Land Registration Department, nor do we think that the mere fact that Bishun Dyal and Ram Pershad filed separate petitions, beyond giving a colour to their statements, really affects the question. It has been held in a number of cases, *Joy Narain Giri v. Girish Chunder Myti*(1), *Chidambaram Chettiar v. Gauri Nachiar*(2) and *Tej Protap Singh v. Champa Kalee Koer*(3), that in a suit not in terms for partition, but seeking a distinct share, a decree awarding separate interest destroys the joint estate according to the principle laid down in the case of *Appovier v. Rama Subba Aiyar*(4). It may be said that this refers only to the member, who seeks to obtain his whole share; but according to the principles laid down in the case just mentioned, the share of no member can be ascertained or specified without ascertaining and specifying the shares of the others. And when the plaintiffs in the suit of 1863 asked for and recovered a decree for three-fifths "their own respective shares" (*hissis khudha*), does not that imply the specification of their shares in severalty, and indicate a tenancy, in future, in common, instead of a joint-tenancy?

"We come now to the question of cesser of commensality and description of unity of worship. The plaintiffs' case is, as we have already noticed, that although in consequence of an increase in the family they resided in separate dwellings, they were always joint in food and worship, that they had a common *bhandar* or store-house from which the provisions were periodically distributed among the different members, and that they had a specific place where the family god was located and worshipped by all the members of the family. It must be remembered that joint family worship is the pivot around which the life of a Hindu family turns, and it may be taken that, when the plaintiffs alleged that Tiluckdhari was

(1) (1878) I. L. R. 4 Calc. 434.

(2) (1879) I. L. R. 2 Mad. 83.

(3) (1885) I. L. R. 12 Calc. 96.

(4) (1866) 11 Moore's I. A. 75.

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joint in food and worship, they regarded those elements as necessary and essential for the constitution of the status of a joint family from which springs the right of survivorship. Both those elements have been found to be non-existing so far as Tiluckdhari was concerned. This finding of the Subordinate Judge has been questioned by the learned Advocate-General; but after the fullest consideration we have come to the conclusion that there is absolutely no ground for taking a contrary view. \* \* \* \* \* The evidence on behalf of the defendants regarding the performance of marriage ceremonies and other festivals is overwhelming, and is of a character far different from that adduced on the plaintiffs' side; and we have no hesitation in holding with the Subordinate Judge that Tiluckdhari was separate in worship from the plaintiffs at the time of his death and in all probability ever since he took up a separate residence, for it is only reasonable that, when the different members took up separate residences, they should naturally consecrate, in accordance with Hindu customs, their separate dwelling places by the establishment of separate deities. If the conclusion on these two points, *vis.*, separation in mess and worship, on which we are in accord with the Subordinate Judge, be correct, it seems to us his view on the main question can scarcely be considered to be well founded.

"The Subordinate Judge has proceeded upon the presumption that the ordinary state of a Hindu family is joint, and he has accordingly thrown on the defendants the onus of proving separation. It seems to us that the Lower Court is in error on this point. When the question simply is whether the deceased was separate or joint, the onus no doubt is on the party alleging separation; but where it is found, as in this case, that the parties were living separately, messing separately and worshipping separately, the ordinary presumption falls to the ground; in such a case it rests on the party, who alleges the continuance of "indivision," in spite of severance in these particulars, to prove his allegation.

"In the case of *Bannoo v. Kashee Ram*(1) their Lordships of the Privy Council say as follows:—"This is a suit brought in the Court of the Civil Judge of Lucknow by Kashee Ram, a nephew of Ram Dyal, who died in the year 1873, against Mussummat Bannoo and Mussummat Munna, the widows of Ram Dyal and Munna Lal, his grandson, the son of his daughter. The claim is for an 8-annas share, or one-half of all the property in possession of Ram Dyal at the time of his death. The property consists principally of movable property, but the claim includes a pucca house and shop. The claim is based on the foundation that Ram Dyal at the time of his death, was a member of a joint family, consisting of himself and of the plaintiff Kashee Ram and his brother Kesho Ram, these two being the sons of Ram Buksh, a brother of Ram Dyal. Kesho Ram did not join in this suit. The state of the family was this: Ram Golam left four sons, Sheo Buksh, Ram Bilash, Ram Buksh and Ram Dyal. Sheo Buksh and Ram Bilash are dead, one dying without a widow or children and the other leaving a widow only. Ram Buksh had two sons, Kashee Ram, the plaintiff, and Kesho Ram. Ram Dyal had no son. The plaintiff admits in his plaint that his grandfather, Ram Golam, divided the ancestral property amongst his four sons, though according to his statement the four sons did not take separately, but Sheo Buksh and Ram Bilash took

(1) (1877) I. L. R. 3 Calc. 315.

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one-half jointly and so formed a separate family, and the other half was allotted to Ram Buksh and Ram Dyal. He contends that Ram Buksh and Ram Dyal remained a joint family. On the part of the present appellants, the defendants, it is stated that the division by Ram Golam was not into two parts, as Kasee Ram contends, but that each of the sons took a separate share. There is no distinct proof, one way or the other, as to the nature of that division; but undoubtedly a division was made, and it may be taken as against the plaintiff that at all events the family was divided into two groups at that time. It further appears that in the lifetime of Ram Dyal, Kasee Ram, the plaintiff, and his brother Kesho Ram as between themselves separated, and therefore the family was still further broken up. It also appears that, whatever the division of the property may have been by Ram Golam, all the members of the family lived separately, and there was no commensality between them. In the case of an ordinary Hindu family who are living together or who have their entire property in common, the presumption is that all that any one member of the family is found in possession of belongs to the common stock. That is the ordinary presumption, and the onus of establishing the contrary is thrown on the member of the family, who disputes it. Having regard, however, to the state of this family, when the present dispute arose, their Lordships think that that presumption cannot be relied upon as the foundation of the plaintiff's claim, and therefore, as he seeks to recover property, which was in the possession of Ram Dyal and was ostensibly his own at the time of his death, it lies upon him to establish by evidence the foundation of his case, viz., that the property was joint property to which he and his brother Kesho Ram, as surviving members, were entitled.'

"It has been repeatedly held that severance or separation is a matter of intention. That intention may be evidenced in different ways; but, once it is established, its effect is conclusive and puts an end definitely to the status of co-parcenary. The parties may continue to hold properties jointly or to transact business jointly, either for purposes of better or more economical management, or because from the nature of the business it could not be divided without involving its destruction; but they are no longer joint tenants; their position thenceforth is that of tenants in common, having separate rights and separate interests.

"In West and Bühler's Notes on Hindu Law, cases are given in which separation in mess and residence was held by the Pundits to be conclusive evidence of separation.

"In page 852 of the 3rd edition are the following questions and answers:—

Question:—A man had three sons. They used to live and take their meals separately in a house, which was their ancestral property. They all subsequently died; a son of one of them claims a moiety of the house from the son of the other. The defendant in this case takes no objection to the equal division of the house. The widow of the third brother has joined the plaintiff. The house which is the ancestral acquisition of the family appears to be undivided property. Should the abovementioned claimants be allowed under these circumstances equal or different shares in it? Answer:—Preparing food and taking meals separately by brothers is considered by the Shastras to be a mark of separation. According to this rule the three brothers are duly separated. Each of them has an equal share in the property. The widow of one of them should be allowed one-third of the house as the share of her husband.'

On page 853, we find another case: "Question:—Four uterine brothers lived separately in a house belonging to their father. They had neither divided their property nor passed deeds of separation to each other. They, however, used to take their meals separately. Afterwards all of them died. The eldest of them has left a widowed daughter-in-law. She has a maiden daughter. The two sons of her father-in-law's brother are alive. A creditor of one of them has attached the whole house. The widowed daughter-in-law has applied for the removal of the attachment from the portion of the house, which constitutes her husband's share. The question therefore is, whether, according to the Shastras, and by reason of the four brothers having lived separately, their property, excepting the house in dispute, should be considered as divided, and whether the daughter-in-law can claim a share of it? Answer:—Although there is no documentary evidence to show that the brothers were separate, yet as their places of living, meal and business were separate, they should be considered separated. Their property, including the house in which they lived, must also be considered divided. When any one, after the division of the property, in which he has a share, is dead, his widow has a right to that share" (West and Buhler, pp. 852-853).

The views expressed by the Pundits, so far as they can be gathered from these cases, do not seem to be wholly without warrant. The religious duty of coparceners is single (Mitākshara on Inheritance, c. II, s. 12), and accordingly separate performance of such as are indispensable is the strongest possible indication of the cesser of the status of coparcenary.

"Of the religious duties of the Hindu," says Strange, "some are indispensable, others in their nature voluntary. Of the latter sort are sacrifices, consecrations, the stated ablutions at noon or evening, with whatever else there may be of a similar kind, the performance or non-performance of which respects the individual merely. It being, under any circumstances, competent to discharge these jointly or severally, it follows that the performance of them, the one way or the other, affords no inference as to the state to be investigated. The proof in question results from the separate solemnization of such, the acquittal or neglect which is attended with consequences beneficial or otherwise to the individual, in his capacity of house-keeper (*grehasta*), or master of a family, the third and most important order among the Hindus. Of this kind are, among others, the five great sacraments in favour of the divine sages, the manes, the gods, the spirits and guests enumerated, described and enforced by Manu; it being of such of which it is said that of undivided brethren the religious duty is single, i.e., performed by an act in which all join; severing in them, and performing them separately in their respective houses after partition." The learned author goes on to add:—"Such separate performance is not conclusive: it is a circumstance merely."

In the Viromitradaya the position of separated members is thus shown: "Narada ordains gifts and acceptance of gifts, cattle, food, house, land and attendants must be considered as distinct among separated brethren, as also cooking, religious ceremony, income, and expenditure." Separated and not unseparated kinsmen may reciprocally bear testimony, become sureties, bestow gifts and accept presents. Those by whom such matters are publicly transacted with their co-heirs are to be known separate even without written evidence. Religious ceremony means the worship of gods and th

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like by reason of the text cited before (chap. IX, s. 1, paragraph 2), namely "The worship of gods, &c.," and by reason of the text of Naroda, namely, "of undivided brethren the religious duties are common, after partition, the religious duties also of each of them become separate." In a state of 'indivision,' therefore, the religious duties are performed jointly, whilst separated members must, from the necessity of their respective positions, perform them separately. That in a state of coparcenary the duties which the religious law of the Hindus imposes on the family must be performed jointly in the joint family god-house by all the members, is shown by the attempt made by the plaintiffs in this case to prove that Tiluckdhari was joint with them in worship, until his death, in which attempt they appear to have completely failed. In the case of *Neelkinto Deb Burmono v. Beer Chunder Thakoor*(1) their Lordships of the Judicial Committee say as follows:—"The normal state of every Hindu family is joint. Presumably every such family is joint in food, worship, and estate. In the absence of proof of division, such is the legal presumption, but the members of the family may sever in all or any of these three things." It does not clearly appear from the judgment what the effect on the co-parcenary would be, if the parties severed only in one particular; in other words, whether it would not have the effect of dividing the co-parcenary and substituting in its place a contractual relation. Suppose the members separated in estate and agreed to remain joint in food and worship, a case which is not excluded by the words of their Lordships, would it be contended that the status of co-parcenary continues? If not, would an agreement, tacit or otherwise, to hold the family properties jointly after separation in mess and worship imply a continuance of the estate of jointness?

In *Anundee Kunwar v. Khedoo Lal*(2) cesser of commensality did not appear to have operated as a complete separation of the different members of the family. But in that case the main question was, whether an acquisition made in the name of an individual son of the family was made by the head of the family and as part of the family estate, or the property acquired belonged to the person in whose name the purchase stood; and the remarks of their Lordships, so far as they bear on the question under consideration, differentiate that case from the present:—"This cesser of commensality, whenever it took place, does not appear to have operated as a complete separation of the different members of the family or to have prevented Chuni Lal." So that in fact there was not even a cesser of commensality such as the Hindu Law contemplates, and no separation of worship. The inference therefore was that the family continued joint.

But, although cesser of commensality may not be regarded as conclusive, yet it has always been declared to be strong evidence of partition. And when it is joined to separate worship and separate residence, the presumption based on the theory of the normal condition of a Hindu family can hardly be said to hold good. In this case the Lower Court has found further that Tiluckdhari had separate dealings and separate monetary transactions. The finding has been challenged and we shall discuss it later on. But assuming for the moment that the conclusion of the Subordinate Judge upon the evidence is correct, what is the

(1) (1869) 12 Moore's I. A. 523 : 3 B. L. R. P. C. 13.

(2) (1872) 14 Moore's I. A. 412, 422.

position of the parties? In our opinion, far from there being a presumption in favour of the plaintiffs' allegations, separation in mess, worship and residence, coupled with the fact that Tiluckdhari had at the time of his death separate dealings, raise a strong presumption in favour of the truth of the defendant's case. Apart from the law, when the nature of the plaintiffs' allegation is borne in mind, their failure on the points found against them must have the effect of weakening, if not rebutting, the presumption on which the lower Court relies, and of strengthening the force of the defendant's evidence as to separation of estate. The falsity of their statements as to commensality and jointness of worship must make the Court scrutinize the evidence of jointness with some degree of care.

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After examining the case-law on the question of separation in estate, and the nature of proof necessary to establish it, referring to the cases of *Badamoo Koer v. Wazeer Singh*(1), *Appovier v. Rama Subba Aiyar*(2), *Lalla Mohabeer Pershad v. Kundun Koowar*(3) and the same case on appeal to the Privy Council *Doorga Persad v. Kundun Koowar*(4), and *Cheynt Narain Singh v. Bunwaree Singh*(5), and after considering at great length the evidence, oral and documentary, given in the case, the High Court judgment concluded :—

We thus find that Tiluckdhari was not only separate from the plaintiffs at the time of his death in residence, in mess and in worship, but that most of his business transactions were separate, and that he was in separate receipt of his collection, that he lent money to his alleged coparceners, gave them presents and so forth. Upon a careful review of the entire evidence and also of all the circumstances, we are of opinion that the defendants have fully established that Tiluckdhari was separate from the plaintiffs at the time of his death, and that the plaintiffs have entirely failed to prove the contrary. We, therefore, allow this appeal, and dismiss the cross-appeal. The result is that the plaintiffs' suit will be dismissed with costs in both the Courts.

*Mayne* and *De Gruyther* for the appellants contended that the onus of proving that at the date of his death Tiluckdhari was a member of a joint and undivided family has been wrongly placed by the High Court on the appellants. It was undoubted that the members of the family were joint, in 1861, and the presumption was that they remained joint, until clear proof of separation was adduced: *Prit Koer v. Mahadeo Pershad Singh*(6). The High Court wrongly construed the plaint filed in the former litigation

(1) (1866) 5 W. R. 78.

(2) (1866) 11 Moore's L. A. 75.

(3) (1867) 8 W. R. 116.

(4) (1873) 13 B. L. R. 235.

(5) (1875) 23 W. R. 395.

(6) (1894) 1 L. R. 22 Calc. 85.

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as an admission of an antecedent separation in interest. It was submitted that all the proceedings in that litigation put an end to any allegation that there was any antecedent state of separation.

It was, therefore, the separation of the family that had to be proved, and this had not been done. As to the effect of the decree in the former suit, it was submitted that it did not, as had been held by the High Court, operate in law to effect a separation. Separation was a question of intention. As to what amounted to separation, it was contended that one member of a joint family might separate and take his share without the other members of the family becoming separate: they would remain joint and undivided, actual re-union being unnecessary: *Jaudub Chunder Ghose v. Benodbeharry Ghose*(1), *Kesabram Mahapattar v. Nand Kishor Mahapatar*(2), *Pctambur Dutt v. Hurish Chunder Dutt*(3), *Radha Churn Das v. Kripa Sindhu Dass*(4), *Upendra Narain Myti v. Gopi Nath Bera*(5), *Bata Krishna Naik v. Chintamani Naik*(6), and *Sudarsanam Maistri v. Narasimhulu Maistri*(7) were referred to. The change of residence of some of the members was necessitated by the increase in the number of members of the family and did not imply any separation or intention to separate in other ways.

As to separation in food the cases of *Rewun Persad v. Radha Beeby*(8), *Neelkisto Deb Burmono v. Beer Chunder Thakoor*(9), *Anundee Kunwar v. Khedoo Lal*(10), *Sonatun Bysack v. Juggut-sondree Dossee*(11), *Runjeet Singh v. Koor Gujraj Singh*(12), *Bannoo v. Kashee Ram*(13), and *Sudarsanam Maistri v. Narasimhulu Maistri*(14) were referred to. The evidence was fully discussed, and it was submitted that it showed no separation by the proceedings in 1868 and no separation at all as alleged by the respondents. The specification of shares and their registration under the Land Registration Act (Bengal Act

(1) (1863) 1 Hyde 214.

(2) (1869) 3 B. L. R. A. C. 7.

(3) (1871) 15 W. R. 200.

(4) (1879) I. L. R. 5 Calc. 474.

(5) (1883) I. L. R. 9 Calc. 817, 823.

(6) (1885) I. L. R. 12 Calc. 262.

(7) (1901) I. L. R. 25 Mad. 149, 156.

(8) (1846) 4 Moore's I. A. 137, 168, 169.

(9) (1869) 12 Moore's I. A. 523, 540.

(10) (1872) 14 Moore's I. A. 412, 422.

(11) (1859) 8 Moore's I. A. 66, 86.

(12) (1873) I. L. R. 1 I. A. 9, 20.

(13) (1877) I. L. R. 3 Calc. 315.

(14) (1901) I. L. R. 25 Mad. 149, 155.

VII of 1876) did not amount to a partition or division of the property. *Hookish Kooer v. Kassee Proshad*(1) and the Land Registration Act, ss. 7 and 38, were referred to. As to the fact of a certain specified portion of the property having been purchased by and recorded in the names of individual members of the family, *Gajendar Singh v. Sardar Singh*(2), and *Rewa Prasad Sukal v. Des Dutt Ram Sukal*(3) were referred to, and it was contended that that circumstance was not sufficient evidence of separation. As to the books of account the evidence showed that no separate accounts were kept; and there was no proof of the separate receipt of the income. It was contended that the accounts produced were not admissible in evidence, and the Evidence Act [II of 1855, s. 1, and I of 1872, s. 32, cl. (2) and s. 34], and the case of *The Deputy Commissioner of Barabanki v. Ram Parshad*(4) were referred to. The Evidence Act (I of 1872), s. 34, enacts that the books to be admissible must be kept in the course of business. [Lord Robertson.—The Act applies to entries in books of account, but no inference can be drawn from the absence of an entry relating to any particular matter. Lord Davey referred on this point to *Queen-Empress v. Grees Chunder Banerjee*(5)]. The cases of *Bhog Hong Kong v. Ramanathen Chetty*(6) and *Ramkisto Paul Chowdhry v. Hurrydoss Koondoo*(7) were referred to. The High Court had failed to consider and give effect to the admitted documentary evidence in the case, which establishes that no separation had ever taken place, and they are in error as to what constitutes a separation and as to the evidence necessary to establish it; and these errors of law had materially influenced their judgment on the facts. Many of the facts, moreover, on which the High Court had come to their conclusion, were disbelieved by the Subordinate Judge, and on that ground it was submitted such questions of fact were unreliable. It was also contended that, if separation were held to have taken place, there was a subsequent re-union. The petition of 17th September 1891, which was signed by Tiluckdhari, expressly stated that the family was joint at that time: that was two months only before his death.

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(1) (1881) I. L. R. 7 Calc. 369, 370.

(4) (1899) I. L. R. 27 Calc. 118.

(2) (1826) I. L. R. 18 All. 176.

(5) (1884) I. L. R. 10 Calc. 1024.

(3) (1899) I. L. R. 27 Calc. 515.

(6) (1902) I. L. R. 29 Calc. 334.

(7) (1862) Marshall 219.

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The High Court wrongly held that this petition was not genuine. On the whole of the case it was submitted that the judgment appealed from ought to be set aside.

*Rattigan K. C. and C. W. Arathoon* for the respondents contended that the family were separate from the time of the litigation in 1861: there was then every characteristic of separation and none of the family joint. There were separate acquisitions by Tiluckdhari and by others of the members of the family, and other separate dealings with the landed property; these were shown by the facts found, and the evidence also showed that the members of the family were separate in residence, in food, in business, and that they had no common store. No authority can be found that, where the members of a family are as these members were, they can be said to form a joint family. The effect of the proceedings in the former litigation was to create a separation; the separate shares were ascertained, and petitions, moreover, put in under the Land Registration Act of 1876 showed separate and not joint ownership under the decree. To constitute partition a division by metes and bounds is not essential: it is effected by a specification of the individual interests in property irrespective of metes and bounds. As to this, the *Mitakshara*, ch. I, s. 1, para. 4, as to the "adjustment of two or more rights," the *Viromitradaya*, ch. I, s. 4, and the *Tagore Law Lectures*, 1884-85, p. 169, were referred to. As to the evidence required by Sanskrit books to prove jointness or partnership, reference was made to the *Mitakshara*, ch. II, s. 12; and as to jointness in worship the *Tagore Law Lectures*, 1884, p. 185, was referred to. The following cases were cited as to what constitutes partition:—*Khoorshed Hossein v. Nubbee Fatima*(1), *Dost Muhammad Khan v. Said Begam*(2), *Bannoo v. Kashee Ram*(3), *Josoda Koonwar v. Gouris Byjonath Sohah Singh*(4), *Appovier v. Rama Subba Aiyar*(5), *Doorga Persad v. Kundun Koonwar*(6), *Joy Narain Giri v. Giris Chunder Myti*(7), *Chidambaram Chettiar v. Gauri Nachiar*(8)

(1) (1877) I. L. R. 3 Calc. 551.

(2) (1897) I. L. R. 20 All. 81, 87.

(3) (1877) I. L. R. 3 Calc. 315.

(4) (1866) 6 W. R. 139.

(5) (1866) 11 Moore's I. A. 75.

(6) (1873) 13 B. L. R. 235.

(7) (1873) I. L. R. 4 Calc. 434, 437

(8) (1879) I. L. R. 2 Mad. 83.

*Sonatun Bysack v. Juggutsoondree Dossee*(1), and *Setrucherla Ramabhadra v. Setrucherla Virabhadra*(2). It was submitted that the onus had been rightly thrown on the appellants to prove that they remained joint members of the family with Tiluckdhari. This had not been shown by them; and the evidence of the respondents showed the contrary. The judgment of the High Court therefore was correct and should be upheld.

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Mayne in reply discussed and distinguished the cases cited for the respondents, and referred to *Dhurm Das Pandey v. Shama Soondre Debiah*(3).

The judgment of their Lordships was delivered by

SIR ANDREW SCOBLE. Umra Singh, zamindar of Shaistapur, in the Patna district of Behar, died in 1836, leaving four sons—Gur Sahai, Tundan, Bhikhari and Tukan—and a grandson, Kashi Singh (the son of a predeceased son named Ram Sahai), him surviving. These five persons, for some time after Umra Singh's death, are stated to have formed an undivided Hindu family under the Mitakhshara law. The question in the present appeal is whether Tiluckdhari Singh, the son of Bhikhari, was at the time of his death separate in estate from the rest of the family and the contest is between his nearest agnates, the plaintiffs and appellants, and his widows, the respondents.

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In order to determine this question it is necessary to examine not only the proceedings in this suit, but also those of a previous litigation, which took place between the members of the family in the year 1868.

At the time of the institution of this earlier suit, the family consisted of Tundan, Tukan and Kashi Singh already mentioned, Pokh Narain (son of Gur Sahai) and Tiluckdhari (son of Bhikhari). The plaintiffs were Pokh Narain, Kashi Singh and Tiluckdhari; Tundan was the principal defendant; and Tukan was made a defendant *pro forma*, as he was alleged to be acting in concert with Tundan. The plaint was "for recovery of

(1) (1859) 8 Moore's I. A. 66, 86.

(2) (1899) L. R. 26 I. A. 169.

(3) (1848) 3 Moore's I. A. 229, 240.

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possession, after adjudication upon the rights and interest of the parties respectively, in their shares" of the family property, which was described to be of two classes, partly inherited and partly acquired by purchase, by the joint family. After stating that the family had for many years lived jointly and in commensality, and in joint possession of the family property, and that, as Tundan was "a shrewd man and had the management of Court business, all the deeds and documents were left in his custody," the plaint went on to aver that "as the ancestral house in mouza Shaistapur was not sufficiently large to accommodate the family," Tundan built a house in mouza Nahusa with the joint funds, and in 1861, "with the consent of all the members of the family, took up his abode in it" with his junior wife. This was the beginning of strife; for, although for some time after his removal to the new house, "possession was as before held, and business was carried on jointly," Tundan ere long disputed the possession of one of the family properties with his kinsmen, and criminal proceedings were taken, the result of which was that all the parties had to enter into recognizances to keep the peace. From this time (the plaint proceeds) Tundan, "on the strength of having numerous deeds in his name and possession," commenced the eviction of the other members of the family from the purchased estates, and disturbed them in regard to their ownership of the inherited property. The plaint finally averred that "since the property in suit was acquired by all the parties at the time of joint tenancy and commensality of the partners, every one of them is entitled to an equal share according to the provisions of the *Shastras*." The prayer of the plaint was that "possession over the disputed property" might be decreed to the plaintiffs.

In his written statement, Tundan alleged that, after the death of Umra Singh in 1836, "the four sons personally and Kashi Singh, through his mother and guardian, divided the ancestral property among themselves, and each took possession of his respective share," and broke up commensality; and he claimed the property in his possession as being either his share of the ancestral estate or acquired by himself personally after the partition in 1836. Tundan, on the other hand, in his written statement, supported the view of the plaintiffs, alleging that, up

to 1860, he, the plaintiffs and Tundan, "had everything, as before, in common for all purposes"; that in 1861, he "at the same time with the plaintiffs was ousted from some of his share;" and that "upon the same right that the plaintiffs have in the property in suit," he was entitled to recover his share from Tundan.

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The case came on for settlement of issues in the presence of the pleaders of both parties, and the following question was put to the plaintiffs' pleaders by the Judge: "How long is it since your clients separated and discontinued commensality?" To which the answer was: "The separation took place since 26th Magh, Fasli 1268, the time when Tundan took up his residence in another mouza, and my clients were thrown out of possession on the day the recognizance was taken, i.e., 3rd June 1861."

The following were the first and second issues of fact settled:—

- "1. When did the contending parties, the heirs of the common ancestor Umra Singh, separate from board, and divide the ancestral estate?"
- "2. Whether the property in contention, save that admitted by the defendant Tundan, was acquired from the joint and ancestral funds of all the co-parceners, while the heirs of Umra Singh had joint interest and lived in commensality, or subsequent to the division of the family from the funds of the defendant Tundan."

The suit was tried before the Judge of the District Court of Patna, who, on the 15th September 1868, delivered a judgment dealing mainly with the evidence in support of Tundan's allegation of a partition in 1836, which he found was not proved. "Consequently," he said, "I must decide the issues of law, as well as the first two issues of fact, in favour of the plaintiffs"; and the terms of his decree were "that the plaintiffs shall be put in possession of their shares each respectively in the three-fifths of the properties from Nos. 1 to 35, and 38, 47, 51 and 53 together with mesne profits, the amount of which will be determined in the execution department and also get a decree for the three-fifths of the right alleged by them in respect of the properties from Nos. 40 to 46, 48, 50 and 54."

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This decree was appealed against to the High Court at Calcutta, and eventually to Her late Majesty in Council, and both appeals were dismissed. But, in the interval between the decision of the High Court and the hearing of the appeal in England, an application was made to the High Court for a review on the ground that, "assuming the decision of that Court to be correct, the facts proved showed that a large portion of these properties had been acquired by successful purchases of property sold for arrears of revenue in execution of decree and otherwise by Tundan Singh, who not only manifested great judgment and skill in making the purchases, but seems to have enjoyed some peculiar means of obtaining information and other advantages in the purchase of property in consequence of his connection with \* \* \* wealthy bankers at Patna"; and that under these circumstances, according to Hindu law, he was entitled to a double share. The review was granted and the Court ordered that "should their decision on the main question be affirmed by Her Majesty in Council, a further enquiry would be necessary to determine the shares of the several properties in dispute, to which the plaintiffs and Tundan would be respectively entitled." It does not clearly appear whether this further enquiry was ever held, but the decision of the High Court was confirmed by Her late Majesty in Council on the 9th of June 1874, the only point argued before their Lordships having been the proper construction to be put upon the 21st section of Act I of 1845.

It appears to their Lordships, upon a careful study of these proceedings, that, notwithstanding the imperfect form of the decree, a separation of the joint family in 1861 must be held to be established. The contest before the District Judge was not, whether the family was still joint, but when did they separate. The two dates named by the parties were 1836 and 1861, and it being found that a separation in 1836 was not proved, it seems to have been taken as a necessary inference that the separation took place in 1861. Otherwise it is difficult to understand the meaning of the Judge's decision of the first two issues of fact in favour of the plaintiffs. The first issue being "when did the parties separate from board and divide the ancestral estate," the finding in favour of the plaintiffs upon this issue is unmeaning without

reference to the statement made by their pleaders when the issue was framed, namely, that the separation took place in 1861. And the application for a review of the decree of the High Court clearly indicates that this was the light in which that decree was regarded by Tundan, whose claim for a larger share could not have been satisfied, unless the shares of all the coparceners had been ascertained under a scheme for the partition of the family estate at the alternative date to that suggested by himself.

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It was contended on behalf of the appellants in the present suit that, although the decree in the suit of 1868 may have effected a separation *quoad* Tundan and Tukan, it left the plaintiffs united *inter se*; and that this might have been the legal effect of the decree is undeniable. But here again the conduct of the parties must be looked at, in order to arrive at what constitutes the true test of partition of property according to Hindu law, namely, the intention of the members of the family to become separate owners. The proceedings in the suit now under appeal afford the answer to this question.

In the interval between the institution of the suit of 1868 and the death of Tiluckdhari in 1891, which gave rise to the present suit, several changes had occurred in the family. Kashi Singh died in 1868, soon after the filing of the plaint, leaving two sons named Ram Pershad and Bishun Dyal; and Tundan died, without male issue, in 1876. Tukan brought a suit in 1869, in which he recovered his share in the family property, and made and registered a will in 1887, by which he left his share of the estate to the heirs of his brothers Gur Sahai and Ram Sahai, to the exclusion of the heirs of his nephew Tiluckdhari, who had no male issue.

Tiluckdhari died on the 15th of November 1891, leaving two widows and four daughters him surviving. The widows thereupon obtained a certificate under Act VII of 1889, authorising them to collect certain debts due to their deceased husband, and also procured the registration of their own names in the Collector's books in respect of the landed property, which had previously stood in his name. These attempts to establish their title were strenuously, but ineffectually resisted by the male members of the family, and led to the institution of the suit now under

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appeal in 1893. The plaint recited the history of the family and of the previous litigation, and prayed for the recovery of possession from the widows of the interest of Tiluckdhari in the joint properties on the ground that at the date of his death he and the plaintiffs constituted an undivided Hindu family. The defendants by their written statement alleged a separation of the family in 1861, and that the property left by their husband was his separate estate.

The material issues settled by the Subordinate Judge of Patna, by whom the case was originally tried, were these—

“3. Whether Tiluckdhari Singh was a member of a joint Mitakshara family with the plaintiffs at the time of his death ?

“4. Whether there was separation of the joint family, as described in paragraph 3 of the written statements of the defendants in F. 1268 (A.D. 1861). If not, whether the suit that was instituted by Pokh Narain and others in 1868 against Tundan Singh and the decree passed thereon had the effect in law of creating a partition between the several members of the family ? If so, whether there was subsequent re-union as alleged by the plaintiffs ?”

The Subordinate Judge came to the conclusion that “on the whole” the defence of partition of ancestral property between Tiluckdhari, Pokh Narain and Ram Pershad either in 1861, or after delivery of possession under the decree in the suit of 1868, was not established either by satisfactory oral evidence or by documentary testimony; that “the theories of legal severance and of re-union set up respectively by the defendants and plaintiffs are legal fictions concocted on a mistaken view of certain precedents not at all in point to the facts of this case”; and that “Tiluckdhari, at the time of his death, was separate from Pokh Narain, Ram Pershad and Bishun Dyal in mess, worship and residence, but not in ancestral property, though he acquired on his (own) account certain separate property”; and he passed a decree in conformity with these findings.

The High Court agreed with the Subordinate Judge in holding that Tiluckdhari, at the time of his death, was separate in food, worship and residence from the plaintiffs, but differed from

him, as to there having been no partition of estate. Upon a careful and exhaustive review of the evidence, the learned Judges were of opinion that there was a separation in 1861, when the shares of the parties must have been ascertained, and that there was documentary evidence, dating as far back as 1864, in which these shares were specified in connection with purchases of property by various members of the family at dates anterior to the litigation of 1868. They accordingly dismissed the plaintiffs' suit with costs.

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The evidence on which this decision was based was, in great part, discredited by the Subordinate Judge ; and, in the argument before their Lordships, great stress was laid upon this circumstance. When different conclusions as to matters of fact are formed by the Courts below, there is always more or less ground for damaging criticism of the evidence of witnesses and the genuineness of documents. But in this case the District Judge and the High Court agree that as regards residence, food and worship, the family had long ceased to be joint—the only point of difference being as to partition of ancestral property. Upon this question their Lordships have come to the same conclusion as the High Court. As has already been pointed out, the result of the litigation of 1868 was to ascertain the shares of all parties, and although there was, from the nature of the property, no partition, by metes and bounds, there was undoubtedly a numerical division, by which the proportion of each partner in the holding was fixed. This is conclusively shown by the petitions for registration under Bengal Act VII of 1876, of which a great number are on the record. The petitioners in each case are Pokh Narain, Tiluckdhari, and Ram Pershad and Bishun Dyal ; and the petitions are all in the same form and bear the same date, 20th April 1877. Under the heading “Extent of Applicants’ Interest,” the share of each petitioner is separately stated ; as thus, for example, in Exhibit OO4 relating to mouza Nehusa—

| | | | As. | P. |
|-----------------------------------|-----|-----|-----|----|
| Pokh Narain Singh | ... | ... | 3 | 4 |
| Tiluckdhari Singh | ... | ... | 3 | 4 |
| Ram Pershad Singh and Bishun Dyal | | | | |
| Singh | ... | ... | 3 | 4 |

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and the root of the title is thus described :—

“Your petitioners, the applicants, were in possession of the share in this mouza jointly with Babu Tundan Singh, but owing to disputes your petitioners, the applicants, were dispossessed. Thereupon your petitioners instituted a suit for recovery of three sahamas out of five sahamas, and your petitioners got possession therein under a decree and delivery of possession given by the Court.” These petitions all bear the signatures of the parties, and clearly indicate individual, not joint, ownership, under the final decree in the suit of 1868.

In order to get rid of the effect of these petitions, it was suggested that the shares of the parties were entered at the direction of the registering officer with a view to the imposition of additional stamp duty, but this suggestion is displaced by the terms of the Act, which requires (section 8 c) that the “names and addresses of the proprietors, managers or mortgagees of the estate, with the character and extent of the interest of each proprietor, manager and mortgagee” must be entered on the register; and the petitions, therefore, merely comply with the requirements of the Act.

The only evidence of re-union subsequent to the clear acknowledgment of separate ownership contained in these petitions is to be found in a document bearing date the 17th September, 1891, two months before Tiluckdhari's death, and purporting to be signed by him, in which an absolutely gratuitous statement is made that the family was joint. The High Court considered that this was a fabricated document, and in this opinion their Lordships concur. It was supported by very questionable evidence, and is entirely inconsistent with the general facts of the case.

For the reasons above stated their Lordships have come to the conclusion that Tiluckdhari Singh at the time of his death was not a member of an undivided Hindu family, and they will humbly advise His Majesty that the decree of the High Court ought to be confirmed and this appeal dismissed. The appellants must pay the respondents' costs of this appeal.

*Appeal dismissed.*

Solicitors for the appellants: *Watkins & Lempriere.*

Solicitors for the respondents: *T. L. Wikon & Co.*

J. V. W.

## CIVIL RULE.

TOONYA RAM

v.

EAST INDIAN RAILWAY COMPANY.\*

1902

December 3, 4.

*Indian Railways Act (IX of 1890) s. 72—Risk Note, Form B—Indian Contract Act (IX of 1872) ss. 151, 152, 161—Railway Company—Goods, loss of—Bailee—Suit for compensation.*

A special agreement, known as "Risk Note, Form B," sanctioned by the Governor General in Council under s. 72, cl. (2) of the Indian Railways Act, absolves a Railway Company from all liability for loss of goods from any cause whatsoever.

The Company in such a case is not a bailee under the Indian Contract Act.

RULE granted to the defendants, the East Indian Railway Company, under s. 25 of the Provincial Small Cause Courts Act.

The plaintiff despatched at Muzafferpore on three different dates consignments of tins of ghee for transmission to Howrah and Burdwan through the Bengal and North-Western Railway and the East Indian Railway. When consigning the goods, the plaintiff in each case signed an agreement known as "Risk Note, Form B," the terms of which are set out in the judgment of the High Court. The said consignments were delivered to the consignees at Howrah and Burdwan short of the number despatched, the total number of tins delivered being 285 out of 329 tins despatched, 44 tins being lost in transit. Thereupon the plaintiff instituted the present suit for compensation for loss of goods against both the Bengal and North-Western Railway Company and the East Indian Railway Company in the Court of Small Causes at Tirhoot, the amount claimed being Rs. 388.

The Lower Court dismissed the suit as against the Bengal and North-Western Railway Company on the ground that the plaintiff had not preferred any claim to the Company as required by law,

\* Civil Rule No. 2499 of 1902.

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but decreed the suit against the East Indian Railway Company. It held that the Risk Notes did not absolve the Railway Company from all liability to the plaintiff, that the position of the defendants Company was that of a bailee under ss. 151, 152 and 161 of the Indian Contract Act, and that the Risk Notes could only cover trifling losses, whereas the present was a case of deliberate pilfering.

*Babu Mahendra Nath Ray* for the petitioners. In view of the Risk Notes signed by the plaintiff, the Lower Court should have held that the Company, the petitioners, were not bailees of the goods consigned, but that they were absolved from all liability for loss resulting from any cause whatsoever, even if due to criminal misappropriation by the servants of the Railway Company. The Risk Notes were valid documents, authorised by s. 72, cl. (2), of the Indian Railways Act, and sanctioned by the Governor-General in Council. See *Moheswar Das v. Carter*(1), *Tippanna v. The Southern Maratha Railway Company*(2), *East Indian Railway Company v. Bunyad Ali*(3), and *Balaram Harichand v. The Southern Marhatta Railway Company*(4).

*Dr. Ashutosh Mukherjee* (with him *Babu Jnanendra Nath Bose*) for the opposite party. Under s. 72 of the Indian Railways Act, a special agreement can only *limit* the liability of the Company, but not *extinguish* it, although, no doubt, the present authorities are against this view.

**GHOSH AND HENDERSON JJ.** The subject-matter of this rule is a decree passed by the Subordinate Judge of Muzafferpore, exercising the powers of a Judge of the Small Cause Court, against the East Indian Railway Company, for compensation on account of short delivery of certain goods that were consigned to that Company at Muzafferpore for despatch to Burdwan and Howrah.

The consignor, at the time that the said goods were made over to the Railway Company at Muzafferpore, signed what

(1) (1888) I. L. R. 10 Calc. 210.

(2) (1892) I. L. R. 17 Bom. 417.

(3) (1895) I. L. R. 18 All. 48.

(4) (1894) I. L. R. 19 Bom. 159.

is known as a "Risk Note" prescribed by the Governor General in Council under section 72 of the Indian Railways Act (IX of 1890). The consignor paid a special reduced rate, instead of the ordinary tariff rate chargeable for such consignment, and he agreed as follows:—

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"I, the undersigned, do, in consideration of such lower charge, agree and undertake to hold the said Railway administration and all other Railway administrations working in connection therewith, and also all other transport agents or carriers employed by them respectively, over whose Railways or by whose transport agency or agencies, the said goods or animals may be carried in transit from —station to—station, harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment from any cause whatever before, during and after transit over the said Railway or other Railway lines working in connection therewith or by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignment."

The Railway Company, however, were not in a position to deliver to the consignee the whole of the goods that were consigned to their care, and, as we have already indicated, the plaintiff, the consignor, brought a suit for compensation against the Railway Company for such short delivery of goods.

The Judge of the Small Cause Court, viewing the position of the Railway Company as purely one of a bailee under the Indian Contract Act, has held that, in the absence of any evidence on the part of the Railway Company that they had taken in the matter of these goods the ordinary care, which a bailee is bound to take, they are bound to make good to the plaintiff all loss that he has sustained by reason of the short delivery.

The section of the Railways Act, which bears upon this matter, is section 72, which runs as follows:—

(1) "The responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway shall, subject to the other provisions of this Act, be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872.

(2) "An agreement purporting to limit that responsibility shall, in so far as it purports to effect such limitation, be void unless it (a) is in writing signed by or on behalf of the person

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sending or delivering to the Railway administration the animals or goods, and (b) is otherwise in a form approved by the Governor General in Council.

(3) "Nothing in the common law of England or in the Carriers Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility, as in this section defined, of a Railway administration."

No doubt, as defined in the first portion of this section, the responsibility of the Railway Company is that of a bailee under the Indian Contract Act, but it is subject to the other provisions of the Act, one of the provisions being found in the latter part of the same section; and this prescribes that an agreement purporting to limit that responsibility, namely, the responsibility as specified in the earlier part of the section, shall be void, unless it is in writing signed by the consignor and is in the form prescribed by the Governor General in Council.

It appears to us that the Judge of the Small Cause Court hardly appreciated the bearing and relevancy of the second part of section 72, which we have just quoted. As already stated, the consignor paid a special reduced rate instead of the ordinary tariff rate chargeable for the consignment in question, and it was in consideration of his being allowed to pay such special reduced rate that he undertook to hold the Railway Company harmless and free from all responsibility for any loss, destruction, deterioration or damage of the said consignment. The Subordinate Judge seems to think that this simply limits the responsibility of the Company, and does not altogether do away with their responsibility, and that it applies to the case of a partial loss or partial destruction of the goods; but we are unable to take the same view.

The question raised in this rule seems to have been considered on several occasions both by this Court and by the Allahabad and Bombay High Courts. In the case of *Moheswar Das v. Carter* (1), which was a case governed by the old Railway Act (IV of 1879), but which in section 10 contained provisions very

(1) (1888) I. L. R. 10 Calc. 210.

similar to those that are to be found in section 72 of the present Act, this Court held that the Railway Company could not be held liable to account to the consignee for any loss from any cause whatever during the whole time that the goods were under their charge, inasmuch as the plaintiff had entered into a special contract to hold them harmless. This case seems to have been followed in the case of the *East Indian Railway Company v. Bunyad Ak*(1). The learned Judges there had to consider the provisions of section 72 of Act IX of 1890, and they held that the contract embodied in the Risk Note before them was a valid and legal contract, within the terms of section 72 of the Act. Similarly, in *Tippanna v. The Southern Maratha Railway Company*(2), which was a case of short delivery of goods, the learned Judges held that the contract as embodied in the Risk Note was such as absolved the Railway Company from all liability to make good to the consignee any loss that might have been occasioned by reason of the short delivery of goods. The same principle was affirmed in the case of *Balaram Harichand v. The Southern Marhatta Railway Company*(3).

In this view of the matter, we are clearly of opinion that the decree passed by the Judge of the Small Cause Court against the East Indian Railway Company is wrong in law, and ought to be set aside. The rule is accordingly made absolute with costs.

M. N. R.

*Rule made absolute.*

(1) (1895) I. L. R. 18 All. 43.

(2) (1892) I. L. R. 17 Bom. 417.

(3) (1894) I. L. R. 19 Bom. 159.

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## ORIGINAL CIVIL.

1908  
January 14.

ROSHUN LALL

v.

RAM LALL MULLICK.\*

*Chambers—Civil Procedure Code (Act XIV of 1882) ss. 295, 310A—Sale in execution—Judgment-debtor, deposit by—Rateable distribution.*

Section 295 of the Civil Procedure Code does not apply to a deposit made by a judgment-debtor under s. 310A of the Code.

The words "for payment to the decree-holder" in s. 310A mean that the decree-holder is the person solely entitled to the money paid into Court.

*Hari Sundari Dasya v. Shashi Bala Dasya*(1) and *Bihari Lal Paul v. Gopal Lal Seal*(2) followed.

APPLICATION in Chambers on Registrar's summons by the plaintiff Roshun Lall.

On the 25th of March 1901, the plaintiff Roshun Lall obtained a decree against the defendants Ram Lall Mullick and others for the sum of Rs. 10,761-10-9 with costs, which amounted to Rs. 1,759-7.

He received from the defendants the said sum of Rs. 10,761-10-9 and a sum of Rs. 1,019-0-6 in part payment of the taxed costs, leaving a balance of Rs. 740-6-6. For the recovery of this amount the plaintiff had the defendants' one-sixth share of the premises No. 57 Sovaram Bysack's First Lane, in the town of Calcutta, attached and sold by the Sheriff of Calcutta. After the sale the defendants applied under s. 310A of the Civil Procedure Code to have the sale set aside on depositing in Court a sum equal to five per centum of the purchase-money and the amount specified in the proclamation of sale as required by the section. The defendants' application was granted. Prior to the realization in the manner aforesaid of this amount from the defendants, several applications for execution of decrees for money

\* Original Civil Suit No. 789 of 1900.

(1) (1896) 1 C. W. N. 195.

(2) (1897) 1 C. W. N. 695.



against them had been made to this Court. The plaintiff served a Registrar's summons on all these judgment-creditors and applied before the Judge sitting in chambers for payment to him of the amount deposited by the defendants as aforesaid.

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Some of the judgment-creditors contended that, under the provisions of s. 295 of the Civil Procedure Code, they were entitled to a rateable distribution of the assets realized.

*Mr. Sinha* for the plaintiff. The money was deposited under s. 310A of the Civil Procedure Code for payment to my client, the decree-holder, and to him only. It was a voluntary payment and not assets realized by sale or otherwise in execution of decree. I rely upon *Hari Sundari Dasya v. Shashi Bala Dasya*(1) and *Bihari Lal Paul v. Gopal Lal Seal*(2).

*Mr. Knight* for Golam Nabi, one of the judgment-creditors. The monies in Court are assets realized in execution of a decree, and all the judgment-creditors, who have applied for execution of their decrees, are entitled to a rateable distribution.

*Mr. Kinney* and *Mr. G. C. Dey*, Attorneys on behalf of two other creditors, supported *Mr. Knight's* contention.

**SALE J.** I think I must hold that the language of section 310A of the Code is too precise to enable me to give effect to the arguments based upon the apparent conflict between sections 295 and 310A as to rights of judgment-creditors, who have applied for rateable distribution, and I think I must adopt the construction which has been placed upon section 310A by the cases of *Hari Sundari Dasya v. Shashi Bala Dasya*(1) and of *Bihari Lal Paul v. Gopal Lal Seal*(2). The hardship of such a construction is not so great upon other creditors as it might seem at first sight, because the attachment of the property by these creditors would, on the sale being set aside, still hold good and there would seem to be nothing to prevent any of the judgment-creditors, who have attached, from proceeding to bring the property to a fresh sale under his attachment. I think the

(1) (1896) 1 C. W. N. 195.

(2) (1897) 1 C. W. N. 695.

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words "for payment to the decree-holder" must mean that he is the person solely entitled to the money, which has been paid into Court. The applicant may have his costs of the application and add them to his claim, and as regards the other creditors, who have appeared, they may also add their costs to their respective claims. I certify for Counsel.

Attorney for the plaintiff: *S. K. Deb.*

Attorneys for the judgment-creditors: *Golam Nabi, K. N. Mitter.*

S. C. B.

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## APPELLATE CIVIL.

MOHENDRA NATH MOOKERJEE

v.

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Dec. 10, 18,  
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*Benamdar—Suit—Revocation—Registration—Agent—Document—Lease—Contract Act (IX of 1872) s. 208—Specific Relief Act (I of 1877) s. 23, cl. (b)—Specific performance of contract.*

A *benamdar*, as such, is not entitled to maintain a suit for recovery of possession of immoveable property, of which he is a mere *benamdar*.

*Hari Gobind Adhikari v. Akhoy Kumar Mozumdar*(1) affirmed.

*Bhola Pershad v. Ram Lal*(2) and *Ravji Appaji Kulkarni v. Mahadeo Bapuji Kulkarni*(3) distinguished.

*Nand Kishore Lal v. Ahmad Ata*(4) and *Yad Ram v. Umrao Singh*(5) dissented from.

If the authority of the agent to admit execution of a document is revoked before registration, but such revocation is not known either to the grantee of the document or the registering officer, the document is not invalidated, although it is registered by the agent after the revocation of his authority.

*Mujibunnissa v. Abdur Rahim*(6) distinguished.

G executed a *mawasi* lease in favour of J and stipulated that J was to defray costs of litigation for redeeming the property under lease and that, if he succeeded in redeeming it, he was to obtain possession of it and was to pay rent to G from the date of such possession.

*Held*, that such a document could not transfer the property leased, but was only a contract to be performed in future and upon the happening of a contingency.

*Rajah Sahib Perklad Sein v. Doorga Persaud Tewarree*(7) and *Ramesh Bhabo Soondree Dassiah v. Issur Chunder Dutt*(8) referred to.

Where the personal quality of the party, with whom a contract is made, is a material ingredient in the contract, the right to enforce specific performance ceases upon the death of the person, with whom the contract is made, and cannot be claimed by his legal representative.

\* Appeal from Original Decree No. 375 of 1899 against the decree of Karuna Das Bose, Subordinate Judge of 24-Parganas, dated August, 30th, 1899.

(1) (1889) I. L. R. 16 Cal. 364.

(2) (1896) I. L. R. 24 Calc. 34.

(3) (1897) I. L. R. 22 Bom. 672.

(4) (1895) I. L. R. 18 All. 69.

(5) (1899) I. L. R. 21 All. 380.

(6) (1900) I. L. R. 23 All. 233.

(7) (1869) 12 M. I. A. 286.

(8) (1872) 11 B.L. R. 36.

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If from the nature of the contract it is not intended that A, the contracting party, should further call upon B, with whom the contract is made, to perform his part of the contract, the right to enforce the specific performance of the contract is lost by B by reason of delay and laches in performing his part of the contract, although time is not mentioned in the contract as the essence of it.

### APPEAL by the plaintiff Mohendra Nath Mookerjee.

This appeal arose out of an action for declaration of title to immoveable property. The allegation of the plaintiff was that the property in suit belonged to Gunga Bahu Debi, deceased; that, during her life-time, she borrowed Rs. 25,000 from the defendants 4, 5 and 6 on a mortgage of the said property; that in 1864 the mortgagees foreclosed the mortgage and obtained possession of the property; that there were illegalities in the foreclosure proceedings; that Gunga Bahu Debi contemplated a regular suit to redeem the property; that, being in want of funds, she on the 23rd July 1879 executed a *maurasi mukurari* lease of the property in favour of Jogeswar Bose, who, under the terms of this lease, was to defray all the expenses of litigation for redeeming the property, and who, if he succeeded in redeeming it, was to obtain possession of it and was to pay rent to Gunga Bahu from the date of such possession, that being the sole consideration for the lease; that Jogeswar Bose then obtained on payment of Rs. 1,200 a deed of relinquishment from Kissen Pershad Rora, the reversionary heir of Gunga Bahu Debi's husband, and on the 2nd April 1880, he entered into an *ekrar-namah* with Chunnamal, the father of defendant No. 3, in which it was stipulated that Chunnamal should pay all the expenses of the contemplated redemption suit, and in return would receive from Jogeswar a two-third share in the *maurasi* tenure; that upon the death of Jogeswar Bose and his son Poresch Nath Bose, his estate having devolved upon his minor grandsons and Chunnamal having also died, the defendant No. 3, with the intention of defrauding the said minors, instituted suit No. 93 of 1888 for the redemption of the aforesaid mortgage and induced Gunga Bahu Debi to execute a *maurasi mukurari* lease similar to that which Jogeswar Bose had obtained from her; that the plaintiff purchased in 1897 from the heirs of Jogeswar Bose their one-third

share in the lease of the 3rd July 1879 executed by Gunga Bahu Debi in favour of Jogeswar Bose; that as such, he (the plaintiff) was entitled to all the rights in the said lease; that the subsequent lease in favour of defendant No. 3 was invalid; that the plaintiff was entitled to be substituted in place of the defendant No. 3 in suit No. 93 of 1888; and that he (the plaintiff) was entitled to recover possession in *maurasi* right of the property in dispute; or, in the alternative, that he was entitled to possession of a one-third share of the said property.

The suit was principally resisted by defendant No. 3, and the defence *inter alia* was that the plaintiff was a *benamdar* of the defendants Nos. 4, 5 and 6, and was not entitled to maintain the suit; that the authority of the agent appointed to admit execution of the lease of the 23rd July 1879 had been revoked before the registration of that document; that the lease of the 23rd July 1879 did not transfer to the lessee the property, which it purported to lease and was only in the nature of a contract to grant a lease; that the contract being of a personal nature, its specific performance could not be claimed by the representative in interest of the grantee; that the right to enforce specific performance, if it existed, was lost by reason of the grantee and his representative not having done anything to perform their part of the contract; that the alternative relief claimed was inconsistent with the main relief, and that the *ekrar-namah* of Chunnamal was not admissible in evidence.

The learned Subordinate Judge of 24-Parganas, Babu Karuna Das Bose, dismissed the suit on the ground that the suit did not lie, and that the lease of defendant No. 3 superseded Jogeswar's lease.

*Dr. Rash Behary Ghosh* and *Babu Bussunt Kumar Bose* for the appellant.

*Dr. Ashu'osh Mookerjee* and *Babu Sarat Chandra Roy Chowdhry* for the respondent.

**BAKERJEE AND GEIST JJ.** This appeal arises out of a suit brought by the plaintiff appellant for a declaration that the plaintiff was entitled to all the rights in the lease dated the

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23rd July 1879 executed by the late Gunga Bahu Debi; that the subsequent lease in favour of the defendant No. 3 was invalid; that the plaintiff was entitled to be substituted in place of the defendant No. 3 in suit No. 93 of 1888; and that the plaintiff was entitled to recover possession in *maurasi* right of a twelve annas share of Lot Manirtat and mesne profits in respect of the same, or in the alternative that the plaintiff was entitled to possession of a one-third share of the said property.

The main allegations upon which the suit is based are, that Gunga Bahu Debi was owner of a twelve annas share of Lot Manirtat, which was mortgaged to the defendants Nos. 4 to 6; that with a view to redeem the said property she granted to Jogeswar Bose on the 23rd July 1879 a *maurasi mukarari* lease in respect of the same, stipulating with Jogeswar Bose that she should institute a suit with the help of Jogeswar Bose for redemption of the property, and that upon possession being recovered Jogeswar Bose should hold it in *maurasi* right upon payment of a certain rent; that Jogeswar Bose then obtained on payment of Rs. 1,200 a deed of relinquishment from Kissen Pershad Rora, the reversionary heir of Ganga Bahu Debi's husband; that subsequently on the 2nd April 1880 Chunnamal, the father of the defendant No. 3, and Jogeswar Bose entered into an *ekrarnamah*, in which it was stipulated that Chunnamal should bear the costs to be incurred in the contemplated redemption suit and in return obtain from Jogeswar Bose a two-thirds share in the *maurasi* tenure; that upon the death of Jogeswar Bose and his son, Poresb Nath Bose, his estate having devolved upon his minor grandsons, and Chunnamal, having also died, the defendant No. 3, with the intention of defrauding the said minors, instituted suit No. 93 of 1888 for the redemption of the aforesaid mortgage and induced Ganga Bahu Debi to execute in his favour a *maurasi mukarari pottah*; that the said *pottah* was invalid; and that the plaintiff as purchaser from the surviving minor sons and the widow of Poresb Nath Bose, the son of Jogeswar Bose, in whom the rights under the *pottah* of 3rd July 1879 had become vested, was entitled to these rights, and this suit was instituted by him to obtain the reliefs mentioned at the outset.

The suit was brought against the defendant No. 3 as principal defendant; the first defendant was made a party as claiming to be the heir of Ganga Bahu Debi's husband; the second defendant was made a party as devisee under the will of Ganga Bahu Debi; and the defendants Nos. 4 to 6 were made parties as mortgagees, or the representatives of the mortgagees, to whom Lot Manirtat had been mortgaged. We may here observe that it having been found in a previous litigation that Lot Manirtat was the *stridhan* of Ganga Bahu Debi, the first defendant Ram Chand was not a material party to the suit, nor is there any contest with the second defendant, Shama Bibi, now in this appeal, although in the Court below she disputed the plaintiff's title.

For the purposes of this appeal the defence that is necessary to be considered is that of defendant No. 3. Shortly stated, it was to the following effect—that the lease relied upon by the plaintiff did not effect any transfer of the property leased, but was only an agreement to give a lease, and the plaintiff's predecessors not having performed their part of the contract, the plaintiff is not entitled to enforce his rights under it; that the *ekrarnamah* of Chunnamal relied upon by the plaintiff is not genuine, and the plaintiff is not entitled to any relief under it; that the lease in favour of the answering defendant was valid and binding; and that the plaintiff was only a *benamdar* of the defendants Nos. 4, 5, and 6, and was not entitled to maintain the suit.

The Court below has held that the plaintiff was only a *benamdar* of the defendants Nos. 4, 5, and 6; that the lease upon which the plaintiff based his title was not a lease, but merely a contract to grant a lease; that the authority under which that lease was registered having been revoked before the registration of the document, it became inoperative, and that the plaintiff was not entitled to any relief under that contract, neither he nor his predecessors-in-interest having done anything to fulfil their part of the contract. The Court below has further found that the plaintiff was not entitled to any relief in the alternative under the *ekrarnamah* of Chunnamal, as it was not a registered document and could not be operative in creating an interest in land. And it has accordingly dismissed the plaintiffs' suit and made the plaintiffs and the defendants Nos. 4 to 6, whose *benamdar*

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it has found the plaintiff to be, jointly liable for the costs of the other defendants.

Against this decision of the Court below the plaintiff has preferred appeal No. 375 of 1899, and the defendants Nos. 4 to 6 have preferred appeal No. 377 of 1899.

We shall take up the two appeals separately.

#### APPEAL No. 375 of 1899.

In this appeal it is contended for the appellants (1) that the Court below is wrong in holding upon the evidence that the plaintiff was the *benamdar* of the defendants Nos. 4 to 6; (2) that even if the plaintiff was the *benamdar* of the defendants Nos. 4 to 6, the Court below is wrong in holding that he was not entitled to maintain this suit; (3) that the Court below is wrong in holding that the powers of the agent appointed to admit execution of the lease before the Registrar had been revoked and that the lease has consequently become inoperative; (4) that the Court below is wrong in holding that the lease did not transfer any immovable property, but merely amounted to a contract to grant a lease; (5) that the Court below is wrong in holding that the plaintiff was not entitled to obtain specific performance by reason of the laches of his predecessors-in-interest; (6) that the Court below is wrong in holding that the *ekrar-namah* of Chunnamal was inadmissible in evidence and inoperative upon the question of the alternative relief claimed by the plaintiff.

On the other hand, it is argued for the respondent, the defendant No. 3, that not only is the Court below right in its judgment, so far as that judgment goes, but that the judgment may be further supported on three additional grounds, (1) that the contract of Jogeswar Bose was of a personal nature, and that the right to enforce specific performance did not pass to his heir or assignee; (2) that the alternative relief was inconsistent with the main claim put forward by the plaintiff; (3) that the plaintiff has not acquired any right to this alternative relief under the deed of sale propounded by him.

The case has been very fully and ably argued before us on both sides. The points that arise for determination upon the contentions urged are (1) whether, as a matter of fact, the plaintiff is a



*benamdar* of the defendants Nos. 4 to 6; (2) if that is so, whether, as a matter of law, the plaintiff is entitled to maintain this suit; (3) whether the authority of the agent appointed to admit execution of the lease of the 23rd July 1879 had been revoked before the registration of that document, and if so, what was the effect of such revocation; (4) was the lease of the 23rd July 1879 operative in transferring to the lessee the property, which it purported to lease? or was it only in the nature of a contract to grant a lease? (5) If it was of the latter sort, could the right to enforce specific performance be claimed by the representative in interest of the grantee? or was such right claimable only by the person, with whom the contract was made? (6) Even if the right to obtain specific performance could be claimed by the legal representative of the party with whom the contract was made, was not such right lost by reason of the grantee and his representative not having done anything to perform their part of the contract? (7) whether the alternative relief claimed was inconsistent with the main relief; (8) whether the plaintiff was, under the *kobala*, upon which the suit is based, entitled to the alternative relief; and (9) whether the *ekrarnamah* of Ohunnamal was admissible in evidence in support of the claim for alternative relief, and whether the plaintiff was entitled to any such relief.

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Upon the first point the evidence has been placed before us and we feel bound to say that not only is it wholly insufficient to prove that the plaintiff was a *benamdar* for the defendants Nos. 4 to 6, but it is insufficient even to raise any reasonable suspicion that he was a *benamdar*. In this view of the case it is unnecessary to consider the second point; but as the contention has been raised by the learned vakil for the appellant that the decision of this Court in the case of *Hari Gobind Adhikary v. Akhoy Kumar Mozumdar*(1), to which I was a party and which may be cited in support of the view that a *benamdar* cannot maintain a suit for possession, is based upon an erroneous view of certain observations of the Judicial Committee in the case of *Gopee Krist Gosain v. Gunga Persaud Gosain*(2), I take this opportunity to correct that error, and to show that, notwithstanding

(1) (1883) I. L. R. 16 Cal. 384.

(2) (1854) 6 M. I. A. 53.

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the error pointed out, the conclusion arrived at in that case is correct. In my judgment in that case I said: "As pointed out by the Judicial Committee in the case of *Gopee Krist Gosain v. Gunga Persaud Gosain*(1), a distinction has sometimes been made between suits upon bonds by *benamdars* and suits for recovery of land upon title, and in this latter class of cases it has always been held that a *benamdar* is not entitled to maintain the suit." The passage in the judgment of the Judicial Committee is that at page 72 of vol. VI of Moore's Indian Appeals, where reference is made to Mr. Justice Hyde's notes from Morton's Decision, page 249. We referred to the passage second-hand without referring to Morton's Decisions. I now find on reference to the note in Morton's Decisions that the view I then took was not correct, and that the view taken by the Supreme Court was that in cases of dispute about land the *benamdar*, that is, the party in whose name the title-deed was, was entitled to maintain a suit. But although that was so that was in accordance with the practice of the Supreme Court, in which the distinction between legal title and equitable title was a well-recognised distinction then. We do not, however, think that that would affect the correctness of the decision in the case of *Hari Gobind Adhikary v. Akhoy Kumar Mozumdar*(2). In the mofussil, and I should say generally in the Courts of this country, the *benamdar* is treated merely as a person in whose name any property stands, without his having any legal or equitable title in the same. That being so, there is no reason for holding that a *benamdar* is entitled to maintain a suit. Of course, where a suit has been allowed to be brought by a *benamdar*, the decree in such suit has been held to be binding on the beneficial owner. That is a very different thing from holding that a *benamdar* as such is entitled to maintain a suit for recovery of possession of property, of which he is merely a *benamdar*. Although some of the inconveniences arising from a *benamdar* being permitted to sue may be met, that is no reason why a person who has no right to any property should be held entitled to maintain a suit for recovery of the same. The reason for the decision in the case of *Hari Gobind Adhikary v. Akhoy Kumar Mozumdar*(2)

(1) (1854) 6 M. I. A. 53.

(2) (1889) I. L. R. 16 Calc. 364.

remains unshaken, although one of the authorities cited in support of the view happens not to be an authority in favour of that view. There is no doubt some conflict, more apparent than real, in the decisions of this Court on this point. The cases of *Prosunno Coomar Roy Chowdhry v. Gooroo Churn Sein*(1), *Fuzeelun Beebee v. Omdah Beebee*(2), *Issur Chunder Dutt v. Gopal Chunder Das*(3) and *Baroda Sundari Ghose v. Dino Bandhu Khan*(4), besides the case of *Hari Gobind Adhikary v. Akhoy Koomar Mozumdar*(5), are in favour of the view we take, whilst the case of *Ram Bhurosee Singh v. Bissesser Narain Mahata*(6), which, at best, only suggests a doubt as to the correctness of that view, the case of *Bhola Pershad v. Ram Lal*(7), in which, however, the beneficial owner was subsequently added as a party plaintiff, and the case of *Sachitananda Mohapatra v. Baloram Gorain*(8), in which none of the earlier cases is referred to, may be cited as lending support to the appellant's contention. The balance of authority in this Court is therefore clearly in favour of the view we now take. As for the case of *Ravji Appaji Kulkarni v. Mahadev Bapuji Kulkarni*(9), there also the beneficial owner was subsequently added as a party; and with reference to the two Allahabad cases, *Nand Kishore Lal v. Ahmad Ata*(10) and *Yad Ram v. Umrao Singh*(11); with all respect for the learned Judges who decided them, we must say that we are unable to agree in the view they have taken. In the latter of these two cases the learned Chief Justice says: "Now I do not propose to discuss which of these conflicting views I should follow, if the question were *res integra*. I propose to deal with it simply on the authorities." As we have already observed, we do not see any reason in favour of the opposite view. Dealing with the question as depending for its determination on the balance of authority, we find that so far as this Court is concerned, it is in favour of the view we take.

Upon the third question, namely the question of revocation, the learned Subordinate Judge in the Court below is of opinion that

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(1) (1865) 3 W. R. 159.

(2) (1868) 10 W. R. 469.

(3) (1897) I. L. R. 25 Calc. 98.

(4) (1898) I. L. R. 25 Calc. 874.

(5) (1889) I. L. R. 16 Calc. 364.

(6) (1872) 18 W. R. 454.

(7) (1896) I. L. R. 24 Calc. 84.

(8) (1897) I. L. R. 24 Calc. 644.

(9) (1897) I. L. R. 22 Bom. 672.

(10) (1895) I. L. R. 18 All. 69.

(11) (1899) I. L. R. 21 All. 330.

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Tarini Das Roy Chowdhury, the agent, whose authority was revoked, is the same person as Tarini Churn Ghatak, who was authorised to admit execution of the lease in question before the registering officer and who did admit such execution on behalf of Ganga Bahu Debi. The oral evidence on the record is, however, insufficient to warrant any such inference; and the evidence furnished by the lease in favour of the defendant No. 3 (we have referred to the original) clearly goes to establish the fact that the two persons were not the same, but were different individuals; that document showing that whereas the name of Ganga Bahu Debi was written by the pen of Tarini Das Roy Chowdhury, Tarini Churn Ghatak was an attesting witness to it. This shows that the revocation of the authority of Tarini Das Roy Chowdhury could not in any way have affected the authority given to Tarini Churn Ghatak. We may add that, even if the authority of Tarini Churn Ghatak had been revoked, there being nothing to show that such revocation had been made known either to Jogeswar Bose or to the registering officer, it could not take effect, regard being had to the provisions of section 208 of the Contract Act; and upon this consideration the case of *Mujibunissa v. Abdur Rahim*(1), which may be cited on the other side as showing that the registration was invalid, is distinguishable from the present.

We come now to the fourth point mentioned above, namely, whether the lease to Jogeswar Bose operated as immediate transfer, or was only in the nature of a contract to be performed *in future*, and upon the happening of a contingency—a contract of which the grantee might claim specific performance, if he came into Court showing that he had himself done all that he was bound to do. Upon this point, having regard to the terms of the lease, we are clearly of opinion that the document was not operative in effecting a present transfer of the property leased, but was only a contract to be performed in future. The view we take is amply supported by the decision of the Privy Council in the cases of *Rajah Sahib Perhlad Sein v. Doorga Persaud Tewarree*(2) and *Ranee Bhobo Soondree Dassah v. Issur Chunder*

(1) (1900) I. L. R. 28 All. 233.

(2) (1869) 12. M. I. A. 236.

*Dutt*(1). It was contended by the learned Vakil for the appellant that these two cases have been subsequently explained by their Lordships of the Judicial Committee in the case of *Kali Das Mullick v. Kanhaya Pundit*(2) in which their Lordships held, that delivery of possession was not necessary to complete a transfer of immoveable property.

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That may be quite true, but here the defect in the transaction consisted not merely in want of delivery of possession, but in other important respects.

The subject-matter of the contract was property not only not in the possession of the transferor, but was property to which the transferor might never establish a title, namely, a title to redeem. The document provides that a suit was to be brought to redeem the property, and upon possession being recovered the rents agreed upon should become payable. The case therefore clearly comes within the scope of the rule laid down in the earlier cases decided by their Lordships. The case of *Kali Das Mullick v. Kanhaya Lal Pundit*(3) has no bearing upon it, as that was a case in which the donor's title to the land was not at all in question.

That being, then, the nature and effect of the so-called lease, the question next arises whether the right created by it, namely the right in the grantee to claim specific performance, was a right only personal to him, or whether it can be claimed also by his legal representative. Upon this point section 23, clause (b) of the Specific Relief Act [we quote only so much of the clause as bears upon the case] provides that specific performance of a contract may be obtained by the representative-in-interest of any party thereto, provided that where any personal quality of such party is a material ingredient in the contract, his representative-in-interest "shall not be entitled to specific performance of the contract, unless where his part thereof has already been performed." In the present case it appears to us clear from the terms of the lease of the 23rd July 1879 as well as from the terms of the power of attorney of even date executed by Ganga Bahu Debi in favour of Jogeswar Bose, that the personal quality of the grantee of these two documents and

(1) (1872) 11. B. L. R. 36.

(2) (1884) I. L. R. 11 Calc. 121.

(3) (1884) I. L. R. 11 Calc. 121.

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the confidence which the grantor had in him, formed a material consideration; for in clause 7 of the lease the grantor says :—"As you have agreed to pay all expenses for the institution of the suit against the aforesaid Kishori Mohun Roy and others, I grant this *maurasi mukurari ijara pottah* without any bonus, and as you have consented to undergo all the labour necessary for that purpose, I make the settlement with you on the terms aforesaid." In other words, it was a settlement made in favour of the grantee, because of his consenting to undergo all the labour necessary for the conduct of the litigation with the mortgagees, and the settlement is made without *bonus* in consideration of his agreeing to pay all the expenses of the litigation. The lease further provides in clause 4 that the lessor shall have no right to compromise the redemption suit, but that the power of compromising the suit or withdrawing it was exclusively entrusted to the lessee. This goes clearly to show that the personal quality of the party with whom the contract was made was a material ingredient in the contract. We may in this connection refer to Pollock's Principles of Contract (7th edition), page 471. In this view of the case the right to enforce specific performance ceased to exist upon the death of Jogeswar Bose.

But even if it did not so cease, we are clearly of opinion that the right was lost by reason of the delay and laches on the part of Jogeswar Bose and his successors, and this brings us to the consideration of the sixth point mentioned above. It was argued by the learned Vakil for the appellant that as time was not mentioned in the contract as the essence of it, delay or laches could not operate to the prejudice of the party, with whom the contract was made, unless and until the other contracting party called upon him to perform his part of the contract. That may be the general rule, but in the present case there are two things to be taken into consideration. In the first place does not the contract itself from its very nature and terms show that it was not intended that there should be any further call upon Jogeswar Bose to take steps to institute the redemption suit and to perform his part of the contract? The lady, as appears from the power of attorney, was residing at Benares; she had not funds enough to carry on the

redemption suit, and she had no one to look after such suit nor was it easy for her to come to the 24-Pergunahs. She left it to Jogeswar Bose, the lessee, to institute such suit and to defray the expenses thereof; and she empowered him by the power of attorney to do all that was necessary to be done on her behalf for the conduct of the suit. There is one other matter appearing on the face of the lease itself which goes to show that it was the bounden duty of Jogeswar to institute the suit at the earliest possible opportunity. The lease provides on the one hand that the rent reserved shall become payable to the lessor only from the date that possession is obtained by the lessee; and on the other hand that all mesne profits recoverable from the mortgagees in possession should belong to the lessee. It was therefore the interest of Jogeswar Bose to put off the institution of the suit as long as he could: for then he would be entitled to the mesne profits of the property without having to pay anything in the shape of rent. When that was the position in which he was placed, fairness and honesty required that he should institute the suit without delay: and it could not very well be said that he was under no obligation to institute the suit, until he was required by a fresh call to do so. The contention of the learned Vakil for the appellants that the delay cannot be prejudicial in a case where time is not of the essence of the contract cannot therefore be raised in a case like this. The fact was that, although Jogeswar was living for nearly three years after the date of the lease, he did not take any direct step for the institution of the intended redemption suit, and his subsequent conduct goes to show that he was not prepared to take any effective step towards the institution of the suit, for the only thing he did in furtherance of his contract with Ganga Bahu was to enter into the *ekrarnamah* with Chunnamal on the 2nd of April 1880, stipulating that Chunnamal was to pay all the expenses of the litigation. The truth is, that Jogeswar entered into this speculative transaction without any present means of performing his part of the contract. He did nothing to perform his part of the contract; and now the assignee of his grandson comes to claim the benefit of the contract when another person has, by incurring expense and undergoing trouble, succeeded in obtaining a decree. We do

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not think that the Court would be exercising the judicial discretion vested in it by section 22 of the Specific Relief Act rightly, if it allowed such a claim as this. It has been held in English Courts that a party cannot call upon a Court of Equity for specific performance, unless he shows himself "ready, desirous, prompt and eager." It cannot be said that the plaintiff has shown that he or his predecessors had been so for the 18 years between the date of the contract and the date of the suit [see on this point, Fry on Specific Performance of Contracts, sections 1100 to 1102].

We come next to the last three points in the case which relate to the question of alternative relief. It was argued by the learned Vakil for the appellant that whatever difficulty there may be in the way of the plaintiffs obtaining the full relief claimed, his right to the smaller measure of relief claimed in the alternative could not be questioned, that right being a right to a one-third of the *maurasi* tenure under the *ekrarnamah* executed by Chunnamal, the father of the defendant No. 3, in favour of Jogeswar Bose. Now with reference to this claim it is open at the outset to the objection that it is inconsistent with the other relief claimed. Indeed, the proper way to have claimed these two alternative reliefs was for the plaintiff to have said that he meant to treat the *ekrarnamah* of the 2nd April 1880 as a binding document; that under that document he was entitled in the first instance to a one-third of the *maurasi* tenure, but that, if the *ekrarnamah* was denied by the defendant No. 3, and, if the Court found that document not proved, in that case the plaintiff might be held entitled to the whole of the *maurasi* tenure under the lease in favour of the plaintiff's predecessor in title, Jogeswar Bose. That, however, was not the way in which the alternative reliefs were claimed. But the defect was cured by the learned Vakil for the appellant electing to claim the smaller measure of relief in the first instance in his argument before us, so the technical objection may perhaps be overruled. But then there arises the question whether the plaintiff is entitled to this relief under the *kabala* upon which he bases his title. The *kabala* makes no reference to the *ekrar* between Jogeswar and Chunnamal. We were told, however, to construe the terms of the *kabala* liberally, and not literally, and to hold that, as the plaintiff's vendors did not mean



to reserve any right that they might have to the *maurasi* tenure, when making the transfer in favour of the plaintiff, the plaintiff has not only acquired his vendors' rights under the lease of the 23rd July 1879, but also acquired the rights created by the *ekrar-namah* of the 2nd April 1880. We are inclined to accept the appellant's contention so far; but then does it really avail the plaintiff appellant, if, as we have held, the lease of the 23rd July 1897, or rather the contract evidenced by the document, was one, whereof specific performance could not be claimed by the heirs or assignee of Jogeswar Bose, and if the right created by the contract consequently came to an end upon the death of Jogeswar Bose? Although the *ekrarnamah* of the 2nd April 1880 is expressly said to be binding upon the heirs and legal representatives of Jogeswar and Chunnamal, the consideration for the contract embodied in that document, namely, the right to participate in the *maurasi* to be obtained by Jogeswar ceased to exist, and would it be right to enforce the contract, although the consideration for it has ceased to exist? We must answer that question in the negative.

It was argued that the position of Chunnamal's heir, defendant No. 3, was that of a co partner with Jogeswar's legal representatives in a common venture, and that the lease subsequently obtained by the defendant No. 3 must be held to have been taken by him, not only for himself, but for himself and for his co-partners, for whom he was a constructive trustee. We do not think that the doctrine of co-partnership and of constructive trust should be applied to cases like this. The community of interest ceased with the cessation of the right to enforce specific performance of the contract under the original lease with Jogeswar upon Jogeswar's death; and that being so, Jogeswar's representatives cannot claim any right as against Chunnamal's representatives. In saying what we have just said, we have assumed that the *ekrarnamah* of the 2nd April 1880 was admissible in evidence, notwithstanding that it was an unregistered document, an assumption which is in accordance with the view we have taken of the lease of Jogeswar being only in the nature of a contract to be performed in future. The right created by the *ekrar* should also be treated as being in the nature of a right to obtain specific performance of a contract, and not a right to

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obtain a share of any property, which had been acquired by Jogeswar, and if that is so, the claim of the plaintiff to this alternative relief must be viewed in the nature of a claim for specific performance as against the defendant No. 3, and to such a claim clause (2) of section 22 of the Specific Relief Act would in our opinion be a complete answer; for the performance of the contract would involve hardship on the defendant, which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff. For to enforce specific performance of the contract now would be to oblige the defendant No. 3 to give the plaintiff a share of the *maurasi* tenure he has obtained, which is a much more burdensome one than the tenure of which he was originally content to have only his share, the rent reserved in the second lease being Rs. 1,100, whereas the rent of the first lease was only Rs. 600. The defendant No. 3, moreover, cannot get the whole of the costs and mesne profits to be recovered, but only three-fourths of that amount; and he will have to give to the plaintiff a share in the under-tenure and the costs and mesne profits, without the plaintiffs having had to undergo any expense, trouble or risk. We are therefore of opinion that the claim for the full relief as well as that for the alternative relief have been rightly dismissed by the lower Court; and this appeal must consequently be dismissed with costs.

#### APPEAL No. 377 OF 1899.

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This is an appeal by the defendants Nos. 4 to 6 and it relates to the question of costs, their contention being that they have been wrongly made liable along with the plaintiff for the costs of the other defendants, as they had nothing to do with the claim.

We think that this contention must be given effect to. We have already, in our Judgment in Appeal from Original Decree No. 375 of 1899, said that it is not at all shown that the plaintiff is a *benamdar* for the defendants Nos. 4 to 6. That being so, there is no reason why the defendants Nos. 4 to 6 should be saddled with the costs of the other defendants. The decree of the Court below, so far as it makes them liable for the costs of the other defendants, must therefore be set aside.

We make no order as to the costs of this Court.

S. C. G.

## MADHUB DASS BAIRAGI

1902

v.

## JOGESH CHUNDER SARKAR.\*

August 7, 8.

*Easement—Prescription—Prescriptive right to the use of water—Storage of water in another's tank for the purposes of irrigation—Presumption of right from long enjoyment—Injunction.*

Through an opening at the north-western corner of a tank water flowed in, and by another opening at the south-eastern corner water flowed out, into two channels.

The plaintiff and his predecessors in title used from time immemorial the water of the tank through these openings and channels for irrigating their lands.

*Held*, that a presumption arose that this enjoyment had an origin, conferring a right to the use of the water—*Ramesur Persad Narain Sing v. Koonj Behari Pattuk*(1) relied upon; and that the plaintiffs were entitled to an injunction restraining the defendant from closing up either of the openings.

*Arkwright v. Gell*(2), *Birmingham, Dudley and District Banking Co. v. Ross*(3), *Wood v. Waud*(4), *Burrows v. Lang*(5), *Greatrex v. Hayward*(6), *Kisto Mohun Mookerjee v. Juggurnath Roy Joogie*(7), and *Toolsee Dass Kobeeraj v. Bhyrab Lal Tewaree*(8), referred to.

## SECOND APPEAL by the defendant JOGESH CHUNDER SARKAR.

The plaintiff, Madhub Dass Bairagi, a cultivator, alleged that there was a *mohana* or opening at the south-eastern corner of a tank belonging to the defendant, through which the water used to be baled out into two *nales* or channels for the purpose of irrigating the lands of the plaintiff; and that there was another *mohana* at the north-western corner of the tank, through which the plaintiff and other cultivators used to store water into the said tank from the neighbouring fields for the purpose of irrigating their lands; and that the plaintiff and his predecessors had been enjoying these rights without interruption for 60 or 65 years. The defendant Jogesh Chunder Sarkar closed up both the aforesaid *mohanas* in Assar 1303 B. S. Thereupon the plaintiff

\* Appeals from Appellate Decrees Nos. 1049, 1075 and 1076 of 1899 against the decree of K. N. Roy, Subordinate Judge of Bankoorah, dated the 1st of March 1899, reversing the decree of Baboo Lal Singh, Munsiff of Kotalpur, dated the 23rd of September 1897.

(1) (1878) I. L. R. 4 Calc. 633.

(5) (1901) 2 Ch. 502.

(2) (1839) 5 M. &amp; W. 203.

(6) (1853) 8 Exch. 291.

(3) (1898) L. R. 38 Ch. D. 295.

(7) (1869) 11 W. R. 236.

(4) (1840) 3 Exch. 748.

(8) (1867) 8 W. R. 311.

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brought this action in the Court of the Munsiff of Kotalpur for a declaration that he was entitled to the use of the water flowing in and out of the tank through the aforesaid *mohanas*, and for an injunction restraining the defendant from closing them up.

The defendant admitted in his written statement that the *mohanas* existed from time immemorial, but alleged that the plaintiff or his predecessors never enjoyed any such prescriptive right to the use of the water of the tank as alleged in the plaint, inasmuch as the *mohanas* were used only by the *maliks* for draining out the water of the tank and that they were not used by anyone else.

The Munsiff was of opinion that the plaintiff had failed to make out a clear case of easement, and he therefore dismissed the plaintiff's suit.

The District Judge, on appeal, found that the aforesaid *mohanas* and *nalas* existed as a matter of fact from time immemorial, and that the plaintiff had satisfactorily proved his prescriptive right to irrigate his lands by the water of the tank in question through the south-eastern *mohana*, and also to store water in the said tank for the purposes of irrigation through the north-western *mohana*; and he accordingly allowed the appeal preferred by the plaintiff, reversing the judgment of the Court of first instance.

*Babu Surendra Chandra Sen* for the appellants. The right to water as claimed by the plaintiff is not such a right as may be legally claimed as an easement. To have the plaintiff's land irrigated when the *mohana* is opened by the defendant (owner) himself is very different from the prescriptive right of getting his land irrigated by the water of the defendant's tank according to the plaintiff's own will and pleasure. See *Arkwright v. Gell*(1), *Birmingham, Dudley and District Banking Company v. Ross*(2), *Wood v. Waud*(3), *Burrows v. Lang*(4), *Greatrex v. Hayward*(5).

*Babu Golap Chunder Shastri* for the respondents. The plaintiff has acquired an user over the water of the defendant's

(1) (1839) 5 M. & W. 203.

(3) (1849) 3 Exch. 748.

(2) (1888) L. R. 38 Ch. D. 295.

(4) (1901) 2 Ch. 502.

(5) (1853) 3 Exch. 291.

tank by long and continuous enjoyment: see *Kuto Mohun Mookerjee v. Juggurnath Roy Joogee*(1), *Tootsee Dass Kobeeraj v. Bhyrub Lall Tewaree*(2), *Ramessur Persad Narain Sing v. Koonj Behari Pattuk*(3). The Preamble to Regulation II of 1793 and s. 76 of the Bengal Tenancy Act contemplate tanks and reservoirs for the storage of water for agricultural purposes; a prescriptive right to the use and storage of water as claimed by the plaintiff is not therefore repugnant to the law of this country.

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*Babu Surendra Chandra Sen* in reply. The cases cited by the other side, from the Weekly Reporters, are distinguishable from the present one. The question whether an easement could be claimed by compelling the defendant to collect water in his tank for the benefit of the plaintiff should be answered in the negative: see the judgment of CAUCH C.J. in *Bunsee Sahoo v. Kalee Pershad*(4). Upon the finding of facts the plaintiff is not legally entitled to the decree, which has been passed in his favour by the Lower Appellate Court.

**MAULBRAY C. J.** The difficulties of satisfactorily dealing with a case of this nature are enhanced by the circumstance that the case came before us upon second appeal, and we are therefore precluded from ourselves looking and enquiring into the evidence. It has been found by the Lower Appellate Court that the two *mohanas*, which mean openings, at the north-western and south-eastern corners of the tank in question, and the two *nalas* or channels at the south-eastern corner have existed from time immemorial, and that the plaintiffs and their predecessors have been irrigating their lands from time immemorial by the water of the tank through these *mohanas* and *nalas*. The Judge says this: "In these circumstances, when the plaintiffs and their witnesses swear that these two *nalas* as well as *mohanas* existed from time immemorial, and that they and their predecessors have been irrigating their lands from time immemorial by the water of the tank through these *mohanas* and *nalas*, I think that their evidence ought to be accepted." This is a finding to the

(1) (1860) 11 W. R. 236.

(3) (1878) 1. L. R. 4 Calc. 638.

(2) (1867) 8. W. R. 311.

(4) (1870) 13 W. R. 414.

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effect I have stated. As I understand the facts, the tank has a *mohana* at the north-western corner through which the water flows into the tank and a *mohana* at the south-eastern corner through which the water flows out of the tank into the two *nalas*, and through those two *nalas* which are well defined channels, the water flowed and has been used for the purpose of irrigating the plaintiffs' land. Upon these findings of fact, I think we may reasonably hold that a presumption arises that this enjoyment had an origin which conferred a right, and for this proposition I refer to the judgment of their Lordships of the Judicial Committee in the case of *Ramesur Persad Narain Sing v. Koonj Behari Pattuk*(1). During the course of the argument I entertained some doubt as to whether the principle of the English cases, such as *Arkwright v. Gell*(1), *Birmingham, Dudley and District Banking Co. v. Ross*(2), *Wood v. Waud*(3), *Burrows v. Lang*(4), and *Greatrex v. Hayward*(5), did not apply, though these cases seem not to be quite in accord with the view entertained in the Indian Courts in such cases as *Kisto Mohun Mookerjee v. Juggurnath Roy Joogee*(6) and *Toolsee Dass Koberaj v. Bhyrub Lal Tewaree*(7). But on the whole, I think, upon the findings of fact in the present case, it is governed by the principle of the Privy Council authority (1) to which I have referred. I therefore think that in substance the decree of the Lower Appellate Court is right and that it ought to be affirmed and that there ought to be a declaration that the plaintiffs are entitled to the water from the tank flowing through the *mohana* at the south-eastern corner and that the defendant ought to be restrained by injunction from closing up either the *mohana* at the north-western corner through which the water flows into the tank, or the *mohana* at the south-eastern corner, through which it flows out of the tank, into the two channels I have referred to. Decrees will be made accordingly in all the three cases. The appellant must pay the costs of these appeals.

**STEVENS J.** I concur.

*Appeals dismissed.*

B. D. B.

(1) (1878) I. L. R. 4 Calc. 633.

(4) (1901) 2 Ch. 502.

(2) (1888) L. R. 38 Ch. D. 295.

(5) (1853) 8 Exch 291.

(3) (1840) 3 Exch. 748.

(6) (1869) 11 W. R. 236.

(7) (1867) 8 W. R. 311.

## CRIMINAL REVISION.

KAILAS KURMI

v.

EMPEROR.\*

1902

June 18.

*Public servant—Obstruction—Distrain—Crops—Sanction—Unlawful assembly—Bengal Tenancy Act (VIII of 1885) ss. 123 and 126—Criminal Procedure Code (Act V of 1898) ss. 4 and 195—Penal Code (Act XLV of 1860) ss. 143 and 186.*

A peon was ordered by the Civil Court under the provisions of the Bengal Tenancy Act to cut certain crops, which had already been distrained. The peon with some labourers cut a portion of the crops, when they were forcibly stopped by the petitioners and a mob of men. The peon lodged information of the occurrence at the thanah.

The petitioners were convicted under ss. 143 and 186 of the Penal Code.

*Held* that, as there was in this case no complaint as defined by s. 4 of the Criminal Procedure Code of the public servant concerned, the conviction under s. 186 of the Penal Code should be set aside.

**RULE** granted to the petitioners Kailas Kurmi and others.

This was a Rule calling on the District Magistrate of Shahabad to show cause why the convictions and sentences of the petitioners should not be set aside on the grounds (1) that the prosecution for an offence under s. 186 of the Penal Code had no previous sanction, and was not on the complaint of the public servant concerned within s. 195 of the Code of Criminal Procedure; (2) that no order authorizing the peon to cut the crops had been produced or proved in the case; (3) that separate sentences should not have been passed.

In this case the complainant, Ramdhone Singh, a ticca peon in the Court of the Munsif of Arrah, was deputed by the Munsif to distrain certain crops belonging to one Chatursal Mahto in village Kokila under s. 123 of the Bengal Tenancy Act. In the beginning of January 1902 the peon reported that a field of sugarcane, which had been distrained, was fit for cutting, and on the strength of that report the following order was passed on the 3rd January by the Munsif:— "Peons are allowed to thresh, etc., the crops distrained."

\* Criminal Revision No. 361 of 1902 against the order passed by H. R. H. Coxe, Sessions Judge of Shahabad, dated April 1st, 1902.

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On the 30th January the peon with a number of labourers commenced cutting the sugarcane, and the work progressed without disturbance for two days, but on the 2nd February the petitioner, Kailas Kurmi, the son of Chatursal Mahto, came to the field, followed by a body of men, who carried *lathies* and shouted *maro*. Kailas snatched a *kodali* from one of the labourers, whereupon the rest ran away, and the peon was prevented from further cutting the sugarcane. Subsequently the mob was dispersed by a constable and other civil court peons. The peon Ramdhone Singh then went and lodged information of the occurrence at the thanah.

The petitioners were convicted on the 15th March 1902 under ss. 143 and 186 of the Penal Code, and were sentenced each to rigorous imprisonment for one month under each section. They appealed, but their appeal was dismissed by the Sessions Judge of Arrah on the 1st April 1902.

*Mr. D. Swinhoe (Babu Surendra Nath Ghosal with him)* for the petitioners. The conviction under s. 186 of the Penal Code cannot stand. Under s. 195 of the Criminal Procedure Code no Court can take cognizance of an offence under s. 186 except with the previous sanction or on the complaint of the public servant concerned or of some public servant, to whom he is subordinate. Complaint is defined by s. 4, cl. (h) of the Criminal Procedure Code. In this case there was no such complaint. There was no allegation made to a Magistrate by the peon: he only lodged information at the thanah, but that does not amount to a complaint within the terms of s. 4. The peon reported the occurrence to the Civil Court, but no sanction was given by it for this prosecution. The conviction under s. 143 of the Penal Code should also be set aside. It is alleged that we came in a body and stopped the peon from cutting the sugarcane. The peon had no right to cut the crop, unless he was authorised to do so. It is alleged by the prosecution that he was acting under the orders of the Civil Court, but no such order has been produced or put in evidence in the case, so that there is nothing before the Court to show that the peon was acting under any authority, and, until that is done, how can it be said that we were not justified in



preventing the peon from doing that which he had no right of his own motion to do.

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**HARINGTON AND BRETT JJ.** In this case a Rule was issued calling upon the District Magistrate to show cause why the conviction and sentence should not be set aside or altered, or such other order passed as to this Court might seem fit—*first*, on the ground that the prosecution for the offence under section 186 had no previous sanction and was not on the complaint of the public servant concerned within section 195, and, *secondly*, that no order authorizing the peon to cut the crops had been produced or proved in the case, and, *thirdly*, that separate sentences should not have been passed.

In our opinion the Rule must be made absolute on the first ground. "Complaint" is defined by section 4 of the Code of Criminal Procedure, and it is clear that there was in this case no complaint of a public servant taking "complaint" as defined in the Code of Criminal Procedure. The objection to the conviction therefore is good. The point was duly raised in the Lower Courts and decided against the petitioner, and in our opinion was decided wrongly, and the Rule must be made absolute on that ground.

As to the other point, the conviction under section 143 is questioned on the ground that the authority of the peon was not properly proved in the case, and this rests on a somewhat different footing. It does not appear to us that this point was taken in the Courts below; but having regard to the circumstances of the case, and the fact that these persons were sentenced to one month's imprisonment, out of which they have been imprisoned from 19th March to 14th April, we think we may with propriety reduce the sentence passed in respect of this offence to that which the petitioners have already undergone.

The result is that the Rule as regards the conviction under section 186 is made absolute and the sentence passed on the petitioners under that section is set aside. With respect to the conviction under section 143, the Rule is made absolute by reducing the sentence of imprisonment to that, which has already been suffered by the petitioners.

D. S.

*Rule made absolute.*

## CRIMINAL REVISION.

1902  
August 29.

YAKUB ALI

v.

LETHU THAKUR.\*

*Rioting, charge of—Conviction—Appeal—Acquittal—Convictions of house-trespass and hurt, legality of—Criminal Procedure Code (Act V of 1898) ss. 232 and 423—Penal Code (Act XLV of 1860) ss. 147, 323 and 448.*

The accused were convicted of rioting. That was the only charge before the Magistrate. On appeal the Sessions Judge acquitted them of rioting, but convicted them under ss. 448 and 323 of the Penal Code of house-trespass and hurt.

*Held* that the convictions by the Sessions Judge should be set aside, that the offences were distinct and separate offences, which should have formed the subject of separate charges, and that the accused had been prejudiced by the omission of those charges.

RULE granted to the petitioners Yakub Ali and others.

This Rule was issued upon the District Magistrate of Chittagong to show cause why the order of the Appellate Court convicting the petitioners under ss. 448 and 323 and setting aside the conviction by the Magistrate under s. 147 of the Indian Penal Code should not be set aside on the ground that the petitioners had never been charged with offences under those sections or been required to go into their defence in regard thereto.

On the 24th March 1902 the complainant Lethu Thakur received certain information in consequence of which he saw one of the petitioners, Prosono Kumar Dey, who was a postman, and asked him, if he had got a money-order for him. The petitioner replied that he had paid the money to one Tafil Ali, whereupon the complainant was annoyed and said he would complain against the petitioner. On the night of the 28th March the complainant was called upon to open the door of his hut, and upon doing so the petitioners entered the hut, and having produced a piece of

\* Criminal Revision No. 679 of 1902, against the order passed by H. E. Ransom, Sessions Judge of Chittagong, dated June 9th, 1902.

paper and an inkpad asked the complainant to put his thumb-impression on the paper. He refused to do so. Thereupon the petitioners forcibly caused him to put his thumb-impression on the paper.

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The petitioners were convicted on the 23rd of May 1902 under s. 147 of the Penal Code by the Deputy Magistrate of Chittagong. On appeal the Sessions Judge of Chittagong acquitted the petitioners of the charge of rioting, but convicted them of offences under ss. 448 and 323 of the Penal Code.

*Mr. Caspersz (Babu Joy Gopal Ghose with him)* for the petitioners. The petitioners were charged and convicted under s. 147 of the Penal Code. The Sessions Judge has acquitted them under that section, but has convicted them under ss. 448 and 323 of the Code. These are, however, distinct offences, and the petitioners should have been separately charged with regard to them. The charge under s. 147 was the only charge against them before the Magistrate, and the conviction on appeal by the Sessions Judge under the other sections is illegal. The petitioners have not had an opportunity of meeting those charges and have been greatly prejudiced by their omission. See *Jatu Sing v. Mahabir Singh*(1).

**PAINEP AND MITRA JJ.** The petitioners were convicted by the Magistrate of rioting under section 147 of the Indian Penal Code. On appeal the Sessions Judge, after setting out the case for the prosecution, states:—"If the abovestory be accepted, it is clear that the proceedings were not such as can be properly designated a riot," and he accordingly acquitted the petitioners of that charge. That charge was the only charge in the proceedings of the trial before the Magistrate. The Sessions Judge, however, thought proper on the evidence to convict the petitioners of house-trespass (section 448) and hurt (section 323), but those offences were distinct and separate offences, which should have formed the subject of separate charges. The Magistrate in his explanation seems to think that they are both offences within the terms of that charge as set out by him and within the definition

(1) (1900) I. L. R. 27 Calc. 660.

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of the offence of rioting. The Magistrate is clearly wrong in this respect. The charge does not set out anything amounting to house-trespass; and although hurt is generally committed in the course of rioting, it does not necessarily follow that hurt is so caused, and indeed from the facts set out in the judgment it does not appear that hurt was caused. It is stated that the accused seized Lethu and forcibly affixed his thumb-mark to a rag. But in so doing it does not necessarily follow nor is it so found that they caused bodily pain to Lethu so as to constitute the offence of hurt. We have also considered in connection with this matter whether, within the terms of section 232 of the Code of Criminal Procedure, the accused have been prejudiced by the omission of charges of house-trespass and hurt, and we think that they have been so prejudiced, inasmuch as if those offences had been charged, the defences made might have been of an entirely different character.

The conviction and sentence are accordingly set aside.

D. S.

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## PRIVY COUNCIL.

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JAGADINDRA NATH ROY  
v.  
SECRETARY OF STATE FOR INDIA.

P. C.\*  
1902  
Nov. 18, 19.  
December 18.

[On appeal from the High Court at Fort William in Bengal.]

*Evidence—Thakbust and survey maps—Act IX of 1847, ss. 3, 5, and 6—Permanent Settlement of 1793—Liability of lands to assessment—Onus of proof—Suit for wrongful assessment.*

Maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they are made.

They are not conclusive, and may be shown to be wrong; but in the absence of evidence to the contrary they may be judicially received in evidence as correct when made.

*Satoowri Ghosh Mondal v. Secretary of State for India*(1), *Syama Sundari Dasgya v. Jogobundhu Sootar*(2), *Sarat Sundari Dabi v. Secretary of State for India*(3), *Dewan Ram Jewan Singh v. Collector of Shahabad*(4), and *Ram Jewan Singh v. Collector of Shahabad*(5), referred to.

In every case the question what lands are included in the Permanent Settlement of 1793 is a question of fact and not of law. The onus of proving that the Government revenue fixed in 1793 is assessed on any particular lands as being included in the Permanent Settlement is on those who affirm that such is the case.

Assuming lands not to be within the Permanent Settlement of 1793, the last survey made under s. 3 of Act IX of 1847 is to be taken as the starting point for deciding, when the next survey is made, whether lands are within ss. 5 and 6 of that Act. But when the question is whether lands shown on a particular thak or survey map made since 1793 were or were not included in the lands charged with the assessment permanently fixed in 1793, the last thak or survey map cannot in all cases be acted upon or treated as decisive in the absence of evidence to the contrary.

\* *Present*:—Lords Macnaghten and Lindley, Sir Andrew Scoble, Sir Arthur Wilson and Sir John Bonser.

(1) (1894) I. L. R. 22 Calc. 252.

(3) (1885) I. L. R. 11 Calc. 784.

(2) (1898) I. L. R. 16 Calc. 186.

(4) (1872) 14 B. L. R. 221 (note).

(5) (1878) 19 W. R. 127.

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In this case, in which the plaintiff sued the Government for wrongful assessment of lands which he alleged to be part of his permanently-settled estate, the survey maps were held not to be sufficient to shift the *onus* on to the defendant.

APPEAL from a judgment and decree (17th August 1899) of the High Court, affirming a decree (27th February 1897) of the District Judge of Mymensingh, which reversed on appeal a decree (17th September 1895) of the Subordinate Judge of Mymensingh.

APPEAL by the plaintiff, Jagadindra Nath Roy, to His Majesty in Council.

The plaintiff was owner of a permanently-settled estate which comprised the mouzahs of Tarapore, Jadabdi, Garamara, and Taragunge, and he alleged that certain lands mentioned in the plaint were included in those mauzahs, when the Permanent Settlement was made in 1793; that from December 1852 to February 1854, when the thakbast and revenue survey took place, these lands were in the bed of the Brahmaputra river, which had encroached on the abovenamed mouzahs, but that they afterwards re-formed; that in 1881 the lands were held by the Deara Survey authorities not to be part of the plaintiff's permanently-settled estate, and were assessed to revenue under Act IX of 1847; that the plaintiff was then a minor under the guardianship of his mother appointed guardian by the Court; that she objected that the lands were not liable to assessment, as they were re-formations of parts of the four mouzahs forming part of the permanently-settled estate, but her objection was disallowed; and that in order to obtain possession she accepted a temporary settlement of them from the Revenue authorities in 1885, the settlement to have effect from 1881. Since then the revenue assessed was regularly paid both by the plaintiff's mother during his minority and by the plaintiff himself after he attained his majority. He instituted the present suit on 24th October 1892 (after he came of age) to have the assessment made in 1881 declared illegal and to recover the sums paid as revenue up to the time he attained majority.

The defence so far as material to this report was that the lands did not appertain by re-formation to any of the permanently-settled mouzahs of the plaintiff; that they formed no

original portion of the said mouzahs, and neither fell within the scope of the settlement under which the plaintiff's zemindari was originally assessed with Government revenue nor were comprised within the ambit of the area embraced by the Permanent Settlement; that the absence of all claim for abatement of the land revenue on the part of the plaintiff and his predecessors negatived the allegation that the lands were the diluviated portion of any of the plaintiff's mouzahs after the Permanent Settlement; that at the period of the Permanent Settlement and the revenue survey that followed the lands were covered and entirely enveloped by the deep navigable stream of the Brahmaputra; and that on their appearance they were found to be fresh additions and surplus accretions to the plaintiff's estate, and were rightly resumed and assessed under Act IX of 1847.

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Issues were settled, of which the only one now material is the 3rd, *viz.*, "Is it true that the disputed lands are the re-formed lands appertaining to the permanently-settled talook of the plaintiff, or are they fresh additions or surplus accretions to the talook, as contended on behalf of Government?"

The thak and survey maps of 1852 to 1854 were put in evidence and showed that at that time the Brahmaputra flowed over the lands in dispute, and that the boundaries of the four mouzahs as there shown fell in part in the river, but that the portions covered by the river were separately specified in the particulars of area given in the maps. The survey map of 1881, which was also in evidence, showed the lands as being then dry, the river having changed its course. A local investigation was ordered, and an amin was appointed "to compare the maps filed by the plaintiff on the spot, taking evidence, if necessary, for the purpose of such comparison," and to draw a map. This he did, and he submitted a report in which he stated his opinion that the lands which the plaintiff alleged were wrongly assessed after the survey in 1881 were included in the Permanent Settlement of 1793, and therefore formed part of the plaintiff's permanently-settled estate.

The Subordinate Judge acting on this report and on the map prepared by the amin, and acting also on the thak and survey maps and the oral evidence for the plaintiff, and observing that

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there was no counter-evidence for the defence decreed the suit, holding that the lands in suit were re-formations on the original sites of the plaintiff's four mouzahs. He held that Government had no right to re-assess them, and ordered remission of a portion of the revenue paid by the plaintiff.

On appeal by the Secretary of State, the District Judge as to this portion of the case observed :—

"The plaintiff's case appears to me to fail totally on the merits. As he comes to the Court and asks it to declare that the Revenue authorities acted illegally in assessing these lands, and particularly as he has against him the admissions made by both his guardian and himself referred to above, I think the *onus* lies manifestly on the plaintiff to show that the assessment of these lands to revenue was illegal; in other words, to prove that these lands were part of the estates to which they are now said to belong at the time when those estates were permanently settled, and part of his talook too. This proof is attempted in three ways—(a) by the maps and report of the Civil Court amin, (b) by the examination of certain witnesses to prove the vagaries of the river, and (c) by the production of the thakbust and survey maps.

"As to the amin's maps and report, I have only to say that though ordinarily they would be assumed to be correct in the absence of proof to the contrary, they are in this instance unreliable on the face of them. They are inconsistent with the conclusions of the Deara Survey authorities, and they are inconsistent with the case set up by the plaintiff in the plaint, and accepted so far by the defendant, that at the time of the thakbust and revenue surveys these particular lands were not the asli lands of these villages, but in the bed of the flowing Brahmaputra river. It was never said all through these years, either when the plaintiff's guardian was resisting the claims of the Deara Survey authorities or when the plaintiff brought this suit seven years after she accepted the settlement and when he had had three years from his attainment of majority to make enquiries, that the Deara Survey authorities had fixed on a part of the asli lands and called them accretion. These lands have always been said to be re-formations since 1852. It is in the highest degree unlikely that this should never have been hinted, as if there was any real foundation for the amin's conclusions. I cannot for a moment accept them.

"Next, the evidence of the witnesses called is not worth the paper it is written on. Who could believe the uncorroborated statements of a handful of plaintiff's tenants as to the exact movements of the river 40 years back when these men were hardly more than boys? I am confident no Court would deprive a private individual of part of his estate on such evidence as this, and the State is entitled to the same treatment in the Courts as a private individual. These men would have been made use of years ago to prove what they are now called to depose to, if there were any truth in their statements. Surely the guardian was in a better position, 10 years before this suit, to prove these facts than the plaintiff is now; but she thought better not to attempt it. The evidence of these witnesses is worthless, and I decline to act on it.



"There remain the thakbust and survey maps. One other map of earlier date has been filed, but I cannot see that it helps us in any way. These maps take us as far back as 1852 when these lands, we must now take it, were in the bed of the river. Now there is nothing to show that, previous to 1852, these lands were not in the bed of the river. The mere fact that sand is shown on either or both sides of the river does not to my mind necessarily prove that the river altered its course between the date of the Permanent Settlement and 1852, for it is equally consistent with the supposition that there was a shrinkage in the volume of water, and the sand shown in the survey maps was what was previously part of the river-bed and under water, as part of that bed at the time of the Permanent Settlement. Then there is no evidence that the bed of the Brahmaputra river was settled as part of the estates in question. It is notoriously a large navigable river even now, and *prima facie* the beds of such rivers are public property. \* \* \* \* \* To put it at the very lowest, it seems to me there is no presumption that this river was settled as part of the estates referred to, and there is, as I have said, no proof of it. The facts that the river passed through some of these estates in 1852 and that the area of the water was calculated and the whole shown in the one survey map of the village, are not, as far as I am aware, any admission by the defendant that the river was part of the estate. It was shown together with the estate, and the two areas were calculated together or rather in the same map, purely for statistical purposes and for convenience. Plaintiff does not claim the bed of the Brahmaputra river, or even the jalkar, I may point out. Further, I have to point out that even if it were shown that these lands were part of the estates as permanently settled—not knowing when they disappeared, and not having the plaintiff's potiah before us, there is no evidence that these lands were settled with plaintiff as part of his *talook*."

Consequent on his findings the District Judge allowed the appeal and dismissed the suit with costs. The case came on appeal before a Divisional Bench of the High Court (MACPHERSON and HILL JJ.) as a second appeal, and that Court confirmed the decision of the District Judge. They said:—

"The District Judge rejected as worthless the oral evidence, which was apparently adduced to prove that the land which is said to have been illegally assessed with Government revenue is land which was, many years ago, washed away by the action of the river Brahmaputra. He also held that the map and report of the amin, when taken in connection with the circumstances of the case and statements and conduct of the parties, could not be accepted as accurate. There remained only the thakbust and survey maps, and these were all that the plaintiff could rely upon in support of his claim. It is not his case that the bed of the Brahmaputra river formed part of his permanent estate. He makes no such allegation. His case is, that the land is land of his estate, which was washed away by the river, and has re-formed on its old site. Of this there is no proof at all; but it is common ground that the river flowed over this land

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at the time of the survey in 1854, and that the land has since re-formed. For all we know to the contrary, the river may never have changed its course in this particular locality prior to 1854; if it did not do so, and if the river-bed was not included in the land permanently settled—a fact of which there is no proof and in favour of which there is no presumption,—it cannot be said that the land is part of the estate.

“It is argued, however, that the thakbust and survey maps furnish in themselves sufficient proof of the plaintiff's case, because they show that the river then flowed through, or alongside, the villages in question, and that it was included in the mouzabs both according to the map and the surveyed area as stated in it. The Judge has not refused to accept the maps as evidence, nor has he omitted to take into consideration the circumstances referred to; but he says the statements in the map do not amount to an admission by the Government that the river-bed is part of the estate, and the circumstances are not sufficient in his judgment to prove that it was. In so dealing with them, we cannot say that the Judge has committed an error of law. He is certainly right in saying that there is no admission, on the part of the Government, of the fact, which it was necessary for the plaintiff to prove. The maps may be evidence against the Government to the same extent that they would be evidence against the proprietor of an adjoining estate. Assuming them to be so, and that they show that this large navigable river was included in the mouzabs as surveyed, it does not follow that the river was settled as a part of the estate at the time of the Permanent Settlement. As already stated, the plaintiff does not claim the river-bed, or even, so far as appears, the jalkar right in the river, and the land in question is land gained from the river. The cases show that the maps are evidence of possession at the time when they were made, and as such may be evidence of title; but the weight to be attached to them must vary according to the circumstances of each case. Unless we are prepared to hold that these maps are in themselves sufficient to prove the plaintiff's case, the appeal must fail. We are not prepared to hold that, and we dismiss the appeal with costs.”

*Rattigan K. C.* and *C. W. Arathoon* for the appellant contended that the evidence adduced showed that the lands were originally part of the appellant's permanently-settled estate, which has been covered with water by a change in the course of the river and had then re-formed on the same site. They had therefore, on the principle laid down in the case of *The Secretary of State for India v. Fahamidannissa Begum*(1), been wrongly assessed with revenue. They were not lands “added” to the appellant's estate within the meaning of s. 6 of Act IX of 1847. The whole area of the land within the thakbust and survey maps was included as forming the permanently-settled

(1) (1889) I. L. R. 17 Calc. 590.

estate, whether that area was dry land or land covered with water. The Courts should at least have presumed that the land covered with water was settled, until the contrary was shown by the respondent. The *onus* was no doubt on the appellant to show that these lands were part of his permanently-settled estate; but it was submitted the *onus* had been discharged by the evidence afforded by the thak and survey maps of 1851-54 and 1881, and it was now for the respondent to show that the lands were liable to assessment as not having been originally part of the appellant's estate, but as being accretions to it. As to the weight and effect as evidence of thakbust and survey maps, the cases of *Dewan Ram Jewan Singh v. Collector of Shahabad*(1), *Ram Jewan Singh v. Collector of Shahabad*(2), *Satcouri Ghosh Mondal v. Secretary of State for India*(3), *Syama Sunderi Dassya v. Jogobundhu Sootar*(4), and *Sarat Sundari Dabi v. Secretary of State for India*(5) were referred to; and it was contended that it was sufficient in a case like the present to produce the map of the survey last preceding the state of things to be proved. The appellant's evidence, moreover, it was pointed out, was not rebutted.

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*A. Phillips* for the respondent contended that it was for the appellant to show that the lands which he alleged had been wrongly assessed formed part of his permanently-settled estate. This he had not done. None of the maps showed that these lands were settled as part of the appellant's estate in 1793, or that they ever formed part of his estate. The case of *Satcouri Ghosh Mondal v. Secretary of State for India*(3) was referred to. As to the weight to be given to the maps as evidence, s. 83 of the Evidence Act (I of 1872) was referred to. The facts must be taken as stated by the District Judge. The case came up to the High Court on second appeal, and the decree of the District Judge was not open to objection on any of the grounds specified in s. 584 of the Civil Procedure Code. The High Court held that there was no error of law.

(1) (1872) 14 B. L. R. 221 (note).

(3) (1894) I. L. R. 22 Calc. 252, 257.

(2) (1878) 19 W. R. 127.

(4) (1888) I. L. R. 16 Calc. 186.

(5) (1885) I. L. R. 11 Calc. 784.

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Nothing has been shown by the maps or other evidence to induce the Committee to decide differently from the High Court and their decision should therefore be upheld.

*Rattigan K.C. in reply.*

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The judgment of their Lordships was delivered by  
**LORD LINDLEY.** The question which their Lordships have to decide in this appeal is whether certain pieces of land, which were in the year 1881 assessed with Government revenue as fresh additions and surplus accretions to the appellant's talook (estate) under the provisions of Act IX of 1847 were or were not lands, which were included in his permanently-settled estate. This estate included four mouzahs,—Tarapore, Jadabdi, Garamara, and Taragunge.

The Brahmaputra which is a public navigable river ran through these mouzahs. The bed of the river presumably was and is Government property. The bed is not the property of the appellant and was not the property of his predecessors in title in 1793. Where the river then flowed is not shown by the evidence in these proceedings, but there is evidence to show that in 1838 it was in the same situation as in 1851 and 1853. After that time and before 1881 the river had shifted its course; and its former bed had become dry land and it has so remained. This dry land is the land in dispute. Locally it is situate in the appellant's mouzahs.

In the year 1881, the Deara Survey authorities, on behalf of the Government, purporting to act in accordance with the provisions of Act IX of 1847, surveyed and marked out the pieces of land in question as surplus accretions and additions to the appellant's said four villages, and assessed the same accordingly. The appellant was then a minor under the guardianship of his mother, who disputed the assessment on the ground that the aforesaid mouzahs were included in the Permanent Settlement of 1793 and that the lands in question were part of them. The assessment authorities, however, considered that the lands in question were new accretions to these mouzahs, and as such were

properly assessable under section 6 of the Act of 1847; and they assessed them accordingly. The appellant's mother did not, <sup>1902</sup> <sup>JAGADINDRA</sup> <sup>NATH ROY</sup> <sup>v.</sup> <sup>SECRETARY</sup> <sup>OF STATE</sup> <sup>FOR INDIA.</sup> contest the matter further, but accepted a settlement of these lands for 12 years, which expired in 1893. In the Courts below it was contended that the appellant was precluded by these proceedings and by lapse of time from disputing the validity of the assessment so made; but this contention did not prevail and was not renewed before this Board. It will not therefore be further alluded to.

The appellant, having come of age, instituted the present suit on the 24th October 1892 for the purpose of having it declared that the assessment of 1881 was illegal and for a return of the assessments paid under it.

The Secretary of State filed an answer to the plaint and stated that both at the period of the Permanent Settlement and the Revenue Survey that followed, the deara blocks were covered and entirely enveloped by the deep navigable stream of the Brahmaputra, and on their appearance they were proved to be fresh additions and surplus accretions to the plaintiff's estate.

Six issues were settled, but the only one now of any importance is the third issue which runs as follows:—"Is it true that the disputed lands are the re-formed lands appertaining to the permanently-settled talook of the plaintiff, or are they fresh additions or surplus accretions to the talook as contended on behalf of Government?"

A local inquiry was directed and a Commissioner (amin) was appointed to conduct it and to report the result. The thak and survey maps of 1851-53 and of 1881 were before him; he took evidence and examined the locality and made a map and report. This map shows that the lands in question were dry in 1881 and since, but that they formed the bed of the river Brahmaputra in 1851-53, and that in those years the river flowed through the appellant's property and that this property was included in the Permanent Settlement of 1793. Further, the amin ascertained and gave the acreage of this property and included the bed of the river in that acreage. He did not, however, find where the river was, nor how the bed of the river was dealt with, when the Permanent Settlement was fixed in 1793.

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Upon this map and report the Court of First Instance decided the above issue in favour of the appellant and ordered Rs. 1,218 to be refunded to him. The District Judge reversed this decision and dismissed the appellant's suit with costs. The appellant then appealed to the High Court; and that Court, although differing from the District Judge on some points, held that he had not committed any error in law affecting the third issue; and the appellant's appeal was dismissed accordingly. The appellant then applied to the High Court for leave to appeal to His Majesty in Council, and such leave was granted on the ground that "the question involved appears to be one of very general importance, *vis.*, as to the true effect of the survey maps having regard to sections 5 and 6 of Act IX of 1847."

This appeal has accordingly been brought and argued. The only questions of law which arise are the construction of section 6 of Act IX of 1847 and the legal effect of that section when applied to the facts of the present case.

It has already been decided by this Board and it is plain from the language of the Act of 1847, that the Act has no application to lands included in the Permanent Settlement of 1793 and the assessment of which lands was then fixed for ever. No new assessments of such lands can be lawfully made. See *Secretary of State for India v. Fahamidannissa Begum*(1). In that case the lands in dispute were dry in 1793, they afterwards became submerged, and then again became dry. It was held that they ought not to have been re-assessed.

In every case the question what lands were included in the Permanent Settlement is a question of fact and not of law. This question may or may not be satisfactorily proved by subsequent survey maps. The *onus* of proving that any particular lands were included in the Permanent Settlement of 1793, in other words, the onus of proving that the Government revenue then fixed was assessed upon any particular lands, is clearly on those, who affirm that such was the case. But their Lordships are not prepared to say as a matter of law that the appellant's Counsel were right in contending that the burden of proof was shifted on to the respondent by the thak and survey maps of 1851-53, and

(1) (1889) I. L. R. 17 Calc. 590.

that those maps ought to have been held sufficient proof that what was part of the bed of the Brahmaputra in those years was included in the Permanent Settlement of 1793. The Brahmaputra was then as it is now a public navigable river, and if the lands in question were then part of its bed as they were in 1851 and apparently also in 1838, it is difficult to suppose and it ought not to be assumed that those lands were included in the lands permanently assessed in 1793. No Court can properly act on the assumption that in 1793 a state of things existed different from what appears from any evidence before the Court. Their Lordships are therefore of opinion that the District Judge did not commit any error of law in dismissing the appellant's suit and that the High Court were right in dismissing the appeal from his decision.

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Their Lordships were, however, referred by Counsel to numerous authorities on the effect of thak and survey maps and of the application of the Act IX of 1847 to them; and having regard to the grounds on which leave to appeal was given in this case, their Lordships will express their views on the principles applicable to these points so far as they arise in the present appeal.

Maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they are made. They are not conclusive and may be shown to be wrong; but in the absence of evidence to the contrary they may be properly judicially received in evidence as correct, when made. This is in accordance with the cases of *Satcowri Ghosh Mondal v. Secretary of State for India*(1), *Syama Sunderi Dassya v. Jogobundhu Sootar*(2), *Sarat Sundari Dabi v. Secretary of State for India*(3), *Dewan Ram Jewan Singh v. Collector of Shahabad*(4), and *Ram Jewan Singh v. Collector of Shahabad*(5).

Assuming lands not to be within the Permanent Settlement of 1793, then their Lordships agree with the contention of the appellant's Counsel that the last survey made under section 3 of the

(1) (1894) I. L. R. 22 Calc. 252.

(3) (1885) I. L. R. 11 Calc. 724.

(2) (1888) I. L. R. 16 Calc. 186.

(4) (1872) 14 B. L. R. 221 (note).

(5) (1878) 19 W. R. 127.

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Act IX of 1847 is to be taken as the starting point for deciding, when the next survey is made, whether lands are within sections 5 and 6 of that Act. But when the question arises whether lands shown on a particular thak or survey map made since 1793 were or were not included in the lands charged with the assessment permanently fixed in 1793 the enquiry is at once enlarged; and it would not be right in point of law to direct the Judge of First Instance that he ought in all cases to act on the last thak or survey map and to treat it as decisive in the absence of evidence to the contrary. In *Sarat Sundari Dabi v. Secretary of State for India*(1) it is not clear whether the re-formed lands were or were not assessed, when the Permanent Settlement was fixed; but if they were, the case went too far and is not consistent with the case of *Secretary of State for India v. Fahamidannissa Begum*(2). Indeed it was distinctly disapproved in India in the case of *Fahamidannissa Begum v. Secretary of State for India*(3) (see p. 92 of that report) and afterwards affirmed in *Secretary of State for India v. Fahamidannissa Begum*(2). In the case of *Sitcouri Ghosh Mondal v. Secretary of State for India*(4) the question was sent back for further inquiry; and in the case before their Lordships the same course might have been taken. But no error in point of law was committed in deciding on the evidence as it stood; and on that evidence the decision of the District Judge was right. It certainly cannot be assumed that the lands in question were dry land in 1793 or that the land forming the bed of a public navigable river was included in the assessment then permanently fixed.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed.

The appellant must pay the costs.

*Appeal dismissed.*

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitor for the respondent: *The Solicitor, India Office.*

J. V. W.

(1) (1885) I. L. R. 11 Calc. 784.

(2) (1889) I. L. R. 17 Calc. 590.

(3) (1886) I. L. R. 14 Calc. 67, 92.

(4) (1894) I. L. R. 22 Calc. 252.



RAM ANUGRA NARAIN SINGH

v.

CHOWDHRY HANUMAN SAHAI.

P.C.\*

1902

Nov. 13, 14.

December 13.

[On appeal from the High Court at Fort William in Bengal.]

*Privy Council, practice of—Concurrent decisions on facts—Courts basing decision on different grounds—One Court relying on oral, and the other on documentary, evidence.*

The rule of the Judicial Committee not to disturb a concurrent finding of fact by two Courts, unless it is clearly shown to be erroneous, is none the less applicable, although the Courts have not taken precisely the same view of the weight to be attached to each particular item of evidence.

A case where one Court has relied on the oral, and the other on the documentary, evidence is within the rule.

APPEAL from a decree (4th August 1899) of a Divisional Bench of the High Court, reversing a decree (24th September 1897) of the Subordinate Judge of Gya, which had dismissed the respondent's suit with costs.

Appeal by the defendant, Ram Anugra Narain Singh, to His Majesty in Council.

The suit was brought to recover property which the defendant was holding under a decree of the Privy Council passed on 27th June 1873(1). The plaintiff claimed under a deed of transfer dated 30th April 1895 by two persons, Sheo Sahai and Balgobind, who asserted that they were the next heirs of one Sheo Churn, and as such heirs were entitled to succeed to certain property held by Sheo Churn's mother as his heir until her death.

The property in suit was a portion of the property belonging to one Ram Dyal Singh, who died on 3rd May 1845. Shortly before his death he made a verbal disposition of his property. He gave it in the first instance to his wife, Brij Koer, for her

\* *Present* :—Lord Macnaghten, Lord Lindley, Sir Andrew Scoble, Sir Arthur Wilson, and Sir John Benson.

(1) 12 B. L. R. 433.

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life, and subject to her life-interest he gave an absolute estate in about two-thirds of the property to Ajudhya Pershad, the only son of his eldest daughter, Sham Soonder Koer, and the remainder of the property he gave to Sheo Churn Lal, the only son of his younger daughter, Mahan Soonder Koer. The present suit relates to a moiety of the property so given to Sheo Churn Lal.

After the death of Ram Dyal a *foutinama*(1) attested by witnesses before whom he had made his verbal will and containing its provisions was registered and attested by the Kasi. That document was dated 7th May 1845.

Brij Koer remained in possession of the property, until her death on 12th October 1851. Sheo Churn had predeceased Brij Koer, and on her death Ajudhya took possession of the share left to him, and Mohan Soonder Koer as heiress of Sheo Churn took possession of his share and retained possession of it, until her death on 15th June 1894. On her death the persons entitled to that portion were the reversionary heirs of Sheo Churn Lal. Mahan Soonder Koer had, besides Sheo Churn, two daughters, Bhawani Koer and Gir Koer. Bhawani Koer, who died a few days before Mahan Soonder, was the wife of Tooka Nath, the father of the plaintiff. Gir Koer had died long before in 1852. She was the wife of the defendant, Ram Anugra Narain Singh. On the death of Mahan Soonder Koer, the defendant, claiming under a deed of gift dated 28th August 1860, which he alleged had been executed by Mahan Soonder Koer, and that she had thereby given a half of her property to each of her daughters, claimed possession of the moiety left to the younger daughter, Gir Koer, his wife, and obtained registration of it in his name on 10th December 1894. Hence this suit, which was instituted on 11th September 1896.

The defendant's written statement alleged that Mohan Soonder held her share of the property not as heir of Sheo Churn, but in absolute ownership under a verbal gift from her father and mother; that Mahan Soonder made a gift of the property in dispute in 1860 to his wife, Gir Koer; that she died in 1864, leaving as her heir an infant son, who died in a few days and to

(1) A document stating the death of an incumbent and the names of his heirs. *Wilson's Glossary*.

whom the defendant became heir, and that his title was affirmed by the Judicial Committee in 1873, subject to Mahan Soonder's right to enjoy the income during her life. The defendant also pleaded that the suit was barred by limitation; denied that Sheo Sahi and Balgobind were the heirs of Sheo Churn or had any title to the property, and said that the deed of transfer itself was a champertous transaction executed without consideration, and that it conferred no title on the plaintiff.

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On these pleadings the material issues were (2) Whether the property in dispute vested in Sheo Churn under Ram Dyal Singh's will, if any, after the death of Ram Dyal Singh? (3) Whether Sheo Sahai and Balgobind *alias* Bhundu, the alleged vendors of the plaintiff, are the nearest *sapindas* and heirs of the said Sheo Churn? (4) Whether the deed of sale dated 30th April 1895 relied on by the plaintiff is a genuine and valid document? (5) Whether the property in dispute was the *stridhan* of Mahan Soonder Koer, mother of Sheo Churn? (6) Whether the Privy Council decree relied on by the defendant in any way affects the plaintiff's claim?

The Subordinate Judge found on the 2nd and 5th issues that the property in suit did vest in Sheo Churn. On the 5th issue he also found that the property was not the *stridhan* of Mohan Soonder. On the 3rd issue he found that Sheo Sahai and Balgobind were shown to be the heirs of Sheo Churn. He held this to be proved chiefly by the oral evidence, upholding that of the plaintiff's witnesses as more trustworthy than that given on behalf of the defendant. On the 4th issue the Subordinate Judge came to the conclusion that the plaintiff's title-deed, the deed of transfer of 30th April 1895, was not a *bona-fide* transaction, and that it was champertous and invalid, because there was a partial failure of the alleged consideration. On the 6th issue he held that the Privy Council decree relied on was not *inter partes*, and therefore not relevant. In the result he dismissed the suit with costs.

On appeal the High Court (MACPHERSON and WILKINS JJ.) concurred with the Subordinate Judge on the 2nd, 3rd and 5th issues, holding that Sheo Churn took a vested interest under the oral will of his grandfather, Ram Dyal Singh; that the defendant's

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story of the oral gift to the daughter, Mahan Soonder, was an inconsistent one and not true; and that Sheo Sahai and Balgobind, the plaintiff's vendors, were the nearest collateral heirs of Sheo Churn. On the 4th issue the High Court differed from the Subordinate Judge as to the transfer of 30th April 1895 to the plaintiff, which they held was valid and effectual.

The High Court reversed the Subordinate Judge's decision and gave the plaintiff a decree.

*Haldane K. C.* and *Mayne* for the appellant contended that both the Courts below were wrong in holding that Sheo Churn took a vested interest in the property in dispute. The evidence did not establish such an interest in him, and all that took place showed that no one in the family ever treated Sheo Churn as being in any different position from that of a daughter's son, whose right depended on his surviving his mother. That Ram Dyal intended to pass over his daughter Mahan Soonder was improbable; but if any interest in the property was given to Sheo Churn it was subject to Brij Koer's life-estate, and contingent on his surviving her, whereas he died before her life-tenancy came to an end. The legal evidence as to the will was insufficient to prove that it was ever made, or what its terms were. The *foutinama* of 7th May 1845 was inadmissible for that purpose, nor, if admissible, was it sufficient proof. On the admissibility of that and other documentary evidence the Evidence Act (I of 1872) s. 32, cl. 5, and s. 35 was referred to. In the absence of a will Mahan Soonder was entitled to succeed as heiress of her father, and in that case title must be made through him and not through Sheo Churn. But Mahan Soonder, it was submitted, was shown to have asserted from the death of Brij Koer in 1851 an absolute and independent title in reference to her share, and had by her dealings with it shown that she claimed to hold it adversely to the reversionary heirs, and so had, as against the heirs of Sheo Churn, obtained a prescriptive title by adverse possession. *Lachhan Kunwar v. Manorath Ram*(1) and *Mahabir Pershad v. Adhikari Koer*(2) were referred to.

(1) (1894) I. L. R. 22 Calc. 445.

(2) (1896) I. L. R. 23 Calc. 942, 946, 948, 949.

It was also contended that the plaintiff had by his conduct shown that he considered himself bound by the Privy Council decree of 1873 under which the defendant held the property in dispute, and that the transfer to the plaintiff of 30th April 1895 was invalid as being made by persons, who never had any title or whose title, if any, had been extinguished. Both Courts below no doubt held that the evidence proved that the transferors, Sheo Shai and Balgobind Sahai, were the heirs of Sheo Churn, but their judgments were, it was submitted, not concurrent decisions on the facts within the rule laid down by the Judicial Committee as they were not based on the same grounds, the first Court relying on the oral, and the High Court on the documentary, evidence.

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*Rattigan K. C. and C. W. Arathoon* for the respondents were not heard.

The judgment of their Lordships was delivered by

**SIR JOHN BONSEL.** This is an appeal from a decree of the *December 13.* High Court of Calcutta which reversed a decree of the Second Subordinate Judge of Gya.

The plaintiff (the present respondent) sued to recover certain villages which were in the possession of the defendant (the present appellant). He claimed under a conveyance made in his favour by the heirs of one Sheo Churn, who was entitled (as he alleged) to the property under the will of one Ram Dyal, subject to the life-interest of Ram Dyal's widow Brij Koer.

The principal questions argued before their Lordships and the Courts below were (1) whether Sheo Churn was entitled to the property as alleged by the plaintiff and (2) whether the plaintiff's vendors were Sheo Churn's heirs.

As regards the first question both Courts found that Ram Dyal did make on his death-bed an oral disposition of this property under which his grandson Sheo Churn, then an infant of tender years, took a vested estate subject to the life-interest of Brij Koer. It was urged by the appellant's Counsel that the evidence was insufficient to establish such a gift, and they insisted on the

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improbability of the testator passing over his own daughter in favour of her infant son, and contended that, even if the testator intended to benefit Sheo Churn, the gift was contingent on his surviving the tenant for life, which he did not do; but their Lordships are of opinion that the finding of the Lower Courts is fully justified by the evidence and ought to be affirmed.

On the second question both Courts agreed in finding that the plaintiff's vendors were proved to be the heirs of Sheo Churn; and according to the well-known rule of this Board such a finding will not be disturbed, unless it can be shown to be clearly erroneous. The appellant's Counsel, however, contended that this finding was not within the rule, because the Courts were not quite agreed on the grounds of their decision—the Subordinate Judge relying on the oral testimony, whilst the High Court based its finding on the documentary evidence. But the rule is none the less applicable, because the Courts may not have taken precisely the same view of the weight to be attached to each particular item of evidence.

A further point which does not appear to have been expressly raised in the Courts below was pressed on their Lordships. It was contended that Mahan Soonder Koer, Sheo Churn's mother, under whom the defendant claims and who entered into possession of the property upon her son's death and enjoyed it, until her own death, which happened shortly before the institution of this suit, acquired an absolute title by adverse possession against the heirs of Sheo Churn. Their Lordships are of opinion that the possession of Mahan Soonder Koer must be referred to her title as heiress of her son, in which capacity she would take a life-interest and that no case of adverse possession has been established.

For these reasons their Lordships will humbly advise His Majesty that the appeal ought to be dismissed. The appellant will pay the respondent's costs.

*Appeal dismissed.*

Solicitors for the appellant: *Watkins & Lempriere.*

Solicitors for the respondent: *Dallimore & Son.*

J. V. W.

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PARMESWAR NARAIN MAHTA AND OTHERS.

1903

R. C.\*

November 20,  
December 13.

[On appeal from the High Court at Fort William in Bengal.]

*Privy Council, practice of—Appeal—Delay—Mistake—Court—Orders—"Sufficient cause"—Limitation Act (XV of 1877) s. 5—Analogous appeal.*

The appellant preferred two appeals from a decision of a Subordinate Judge, one of which, instead of presenting to the High Court, he had filed in the District Court, which on a true valuation of the appeal had no jurisdiction to hear it. While the other, which was an analogous case raising the same question, he had correctly filed in the High Court.

It appeared :—

(a) that when the mistake was brought to the appellant's notice, great delay occurred in the taking of any steps by him to rectify it ;

(b) that the High Court had refused to admit the appeal out of time on the ground of such delay, and because the appellant had not satisfied them that he had made a *bona-fide* mistake, nor that he had sufficient cause under s. 5 of the Limitation Act (XV of 1877) for not presenting the appeal in time ;

(c) that the High Court had transferred to their own files the appeal from the District Court, but on objection taken that they had no power to transfer a case that was not properly before the District Judge, they had dismissed the appeal ; and

(d) that the analogous appeal had been decided by the High Court in the appellant's favour.

On appeal from the orders of the High Court in the wrongly-filed appeal which, it was contended, were under the circumstances erroneous :—

*Held*, by the Judicial Committee that they could not interfere, unless they were satisfied that the refusal of the High Court to admit the appeal out of time was wrong, and they were not so satisfied ; and that the delay which had occurred since the rejection of the appeal by the High Court and which was not accounted for, militated against any interference.

**APPEAL** from an order (19th January 1897) of the High Court at Calcutta, and a decree (20th July 1897) of the same Court, made in the exercise of the Appellate Jurisdiction in appeal 304

\**Present* :—Lords Macnaghten and Lindley, Sir Andrew Scoble, Sir Arthur Wilson, and Sir John Bouverie.

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of 1895, which had been transferred for hearing to the High Court from the Court of the District Judge of Mozufferpore by an order of the High Court dated 9th August 1895.

Appeal by the plaintiff, Ram Narain Joshi, to His Majesty in Council.

The appellant having purchased a share in certain property from the respondent, Bibi Sahodra, subsequently instituted in the Court of the Subordinate Judge of Mozufferpore two suits to set aside two attachments of the property made by different creditors of his vendor. In the first suit (100 of 1892) the market-value of the property in suit was stated to be Rs. 9,855, the price paid by the plaintiff, and the valuation of the suit for the court-fee was Rs. 4,514. Under the second attachment a sale took place at which the property in suit was sold for Rs. 5,650, and in the second suit (18 of 1893) that sum was stated as the valuation for the purpose of assessing the court-fee. By consent the two suits were tried together, and both suits were on 25th June 1894 dismissed by the Subordinate Judge.

The appellant appealed in both suits, but (acting as was alleged under a mistaken belief that the test of the value of the relief for the purpose of jurisdiction was the same as that for the purpose of assessing the court-fee on institution) filed his appeal in suit 100 of 1892 in the Court of the District Judge of Mozufferpore as an appeal in value below Rs. 5,000, the limit of jurisdiction of a District Judge in appeals. His appeal in the other suit, 18 of 1893, in which the valuation for the Court-fee had been put above Rs. 5,000, he filed in the High Court.

In the appeal in the District Judge's Court, the District Judge made an entry in the order sheet that as the value of the claim was Rs. 9,855, the appeals should be filed in the High Court. It was, however, admitted on 4th September 1894, and an entry was made in the order sheet postponing its hearing for an application to be made for its transfer to the High Court, to be tried with the appeal in suit No. 18 of 1893 filed in the High Court. This application was made to the High Court on 9th August 1895, and on the hearing of the application an objection was for the first time made that the appeal to the District Judge was not within his jurisdiction and should have been brought



in the High Court. The High Court, however, directed the transfer, "leaving it open to the parties at the hearing of the appeal to raise the objection." Subsequently on 16th September 1895 and before the hearing of the appeal in suit 18 of 1893, the appellant applied that the memorandum of appeal in suit 100 of 1892 (which had been filed in the District Court and transferred as abovementioned to the High Court) might be admitted as a memorandum of appeal to the High Court.

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This application was rejected by the High Court (BEVERLEY and AMEER ALI JJ.) on 19th January 1897. In rejecting it they observed as follows :—

"We are of opinion that there are several grounds, which debar the applicant from succeeding in this rule.

"This is not an application for the admission of an appeal after time, which is being presented in proper form to this Court. There is no fresh memorandum of appeal now before us. What we are asked to do is to treat an appeal which was presented to the District Judge, and which was called up for trial by this Court, as an appeal to this Court direct, and that in the face of the order of the Division Bench, which called up the appeal for hearing. We are of opinion that we cannot do that. The appeal as presented to the District Judge has been called up to this Court and is now an appeal to this Court, numbered 304 of 1895, and we are at a loss to see how we can interfere in any way with the order made as regards that appeal.

"But even supposing that a fresh memorandum of appeal had been presented and we were asked to admit it after time, we are of opinion that the applicant has not satisfied us that he had sufficient cause for not presenting the appeal before. It may be that in certain cases a mistake made by the parties as to jurisdiction or other matters may be a sufficient cause for admitting an appeal after time; but in the present case it is difficult to see how such a mistake can have occurred. The two suits were in respect of the same property, and it is to be presumed that they were of the same value. They appear to have been instituted on different dates, and that is probably the reason why the values of the suits are put down at different figures; but the applicant, who was the plaintiff in those suits, must have known very well that the value of this suit was above Rs. 5,000 and that the appeal in this, as in the other case, lay to the High Court.

"But even supposing that that mistake could be overlooked and could be treated as a sufficient cause for not having filed this appeal within time, still there is another circumstance which, we think, would preclude the applicant from having this rule made absolute, and that is, that although he became aware of this mistake on the 9th August 1895, he made, no application to this Court, until the 16th of September, or more than five weeks afterwards, and then only in the form of the application to which we have referred. There was no reason whatever why the application could not have been made within a few days of the discovery of the mistake. Of course, had a fresh memorandum of appeal accompanied

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by copies of the judgment and decree of the Lower Court been filed, it might have been urged that time was necessary to procure the copies and to prepare the memorandum; but in this case there was absolutely nothing to be done but to file the application. That being so, we are of opinion that due diligence was not shown in making this application.

"For all these reasons we think that the application fails and that the rule must be discharged. The rule is accordingly discharged with costs."

The analogous appeal filed in the High Court in suit 18 of 1893 was heard and decided in favour of the appellant on 22nd March, 1897.

The appeal in suit 100 of 1892, which had been transferred from the District Judge to the High Court and had been numbered 304 of 1895, came up for consideration on 20th July 1897, when it was dismissed with costs.

The judgment of the Court (TREVELYAN and STREVENs JJ.) dismissing it is reported in I. L. R. 25 Calc. 39, where the facts are fully stated.

On this appeal, which was heard *ex parte*—

A. Phillips for the appellant contended that the Judges of the High Court were in error in not, under the circumstances of the case, exercising all the powers vested in them to enable the appellant to prosecute an appeal, which had been shown by his success in the analogous case to have been justified, and which had only failed through a *bond-fide* mistake. The two suits had been heard together, and had been dealt with in one judgment with the consent and for the convenience of all parties, and neither the want of a fresh memorandum of appeal, nor the delay which occurred in realizing and taking steps to correct the *bond-fide* mistake, which had been made, ought to be allowed to deprive the appellant of the full benefit of his appeal, in the case in which he was successful. He had, it was submitted, shown sufficient cause for not applying earlier for the admission of his appeal in suit 100 of 1892 to the High Court: the refusal of that Court to bring up the appeal in that case and hear it with the other was wrong; and the defects of form in the appellant's endeavours to prosecute the appeal were not such as to disentitle him to the assistance of the Court, which had subsequently decided in the

other appeal that his claim was a just one. The Limitation Act (XV of 1877) s. 5 was referred to.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. The appellant filed his suit on the 9th June, 1892, in the Court of the Subordinate Judge of Mozuf-ferpore. He alleged that he had purchased a share in a certain property from Bibi Sahodra. He complained that, notwithstanding his purchase, the property had been attached in execution by a creditor of his vendor, and he asked to have his title established, and the property released from attachment.

In the following year the appellant brought a second suit in the same Court with respect to the same property, asking for similar relief against another attachment by another creditor. The two suits were heard together, and the Subordinate Judge held that the appellant had failed to prove the genuineness of his purchase, and accordingly dismissed both suits on the 25th June, 1894.

The present suit had originally been valued at a sum under Rs. 5,000, while the second suit was valued at a sum over Rs. 5,000. After the decision by the Subordinate Judge of the two suits against the appellant, he filed an appeal in each case. In the second case he correctly valued the appeal above Rs. 5,000 and filed the appeal in the High Court, the proper tribunal to entertain it. But in the present suit, by an unfortunate error, as it is said, he undervalued his appeal, placing it below Rs. 5,000, and presented it on the 3rd September 1894 in the Court of the District Judge, a Court which on a true valuation had no jurisdiction to hear it. This mistake on the part of the appellant or his advisers has been the source of all his subsequent difficulties.

On the 10th January 1895, upon the petition of the appellant, a Division Bench of the High Court issued an order to show cause why the appeal in this case should not be transferred to the High Court under section 25 of the Civil Procedure Code, and heard with the other appeal already pending in the High Court. The rule to show cause came on for hearing before another Bench on the 9th August 1895, and on that day the order was

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made absolute; but the order then made contains the important words:—"The pleader for the respondent objects to the transfer of his appeal to this Court on the ground that it has been wrongly preferred to the District Judge of Mozufferpore and that upon its proper valuation the appeal should have been made to this Court. As no objection has been raised in the Court to which the appeal has been made, we direct the transfer of the appeal to this Court, leaving it open to the parties, at the hearing of the appeal, to raise this objection. The appellant must understand that should the objection be allowed, he must take the consequences in regard to the course taken by him."

Thus whatever misconception the appellant's advisers may have laboured under prior to the 9th August 1895, on that day at all events their attention was distinctly called to the mistake which had been made and to the consequent difficulties in which the appellant was involved.

The next step taken was on the 16th September 1895. By a petition verified on that date, and presented on behalf of the appellant, it was prayed that the memorandum of appeal, which had been filed in the District Court, might be admitted in the High Court and duly registered and numbered. An order to show cause was issued in the terms of the petition, and this came on for argument on the 19th January 1897.

At the time when this application was made to the High Court the period limited by law for appealing against the original decision of the Subordinate Judge had long expired. And the most favourable light for the appellant in which his petition can be viewed is to regard it as an application to the Court to exercise the power conferred upon it by section 5 of the Limitation Act by which an appeal may be admitted after date "when the appellant satisfies the Court that he had sufficient cause" for not appealing in due time.

The Judges of the Division Bench, which dealt with the matter on the 19th January 1897, first considered certain points, which it is not necessary now to examine, and then they came to the questions arising under the section above cited. They said: "The applicant has not satisfied us that he had sufficient

cause for not presenting his appeal before." They were not convinced that the appellant had really mistaken the value of his appeal; and they further thought that the delay between the 9th August and the 16th September, for which no reason was shown, would preclude the applicant from having the rule made absolute, and it was accordingly discharged.

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The appeal in this case came on for hearing before a Bench of the High Court on the 20th July 1897, and the objection was at once raised that the Court had no jurisdiction to hear it. It appears that some time before this date the appeal in the other case had been heard, and the decision of the first Court reversed, and a decree made in the appellant's favour.

In dealing with the appeal in this case the learned Judges before whom it came held that, as to admitting the appeal to the High Court out of time, the matter was concluded by the decision of the Division Bench in discharging the order to show cause on the 19th January 1897, and after considering the other points raised before them, they dismissed the appeal for want of jurisdiction.

Against this dismissal of the appeal to the High Court, the present appeal has been brought, and has been heard *ex parte*.

It has been pressed upon their Lordships that the case is one of apparent hardship, inasmuch as in two cases raising the same question on the merits the appellant has a decree in his favour in one, and a decree against him in the other, and that, though the whole difficulty has arisen from the mistakes of the appellant or his advisers, those mistakes were venial, and he ought, if possible, to be relieved from the serious consequences, which they have entailed. In particular it was urged that the refusal of the Division Bench on the 19th January 1897 to admit the appeal out of date, which was treated as conclusive at the hearing, was wrong. And it was suggested that the dismissal of the appeal by the High Court ought to be set aside and the case remitted to that Court, in order that it may again consider the question decided on the 19th January 1897.

Their Lordships are of opinion that they could not properly interfere in this case, unless they were satisfied that the refusal

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by the Division Bench on the 19th January 1897 to admit the appellant's appeal after date was wrong, and they are not so satisfied. And the long interval of time which has elapsed between the 19th January 1897 and the hearing of this appeal before their Lordships would enhance the danger of such interference. The appellant may or may not be responsible for this delay, but at least it has not been accounted for.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: *T. L. Wilson & Co.*

J. V. W.

ORIGINAL CIVIL.

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THE CORPORATION OF CALCUTTA.*

1908

Jan. 20.

Building—Calcutta Municipal Consolidation Act (B.C. II of 1888) ss. 247, 250
427—Sanction—Limitation—Damages.

A sanction to build, given by the Municipal Corporation of Calcutta under 247 of the Calcutta Municipal Consolidation Act (B.C. II of 1888), is absolute and when such sanction is once given there is nothing in the Act, which enables the Corporation to revoke it.

The Corporation having granted sanction to the plaintiff, after the site had been duly inspected and approved of by its officer, to erect a mill on his giving an undertaking, is not entitled, in an action for damages caused by the withdrawal of the sanction, to plead in defence that the officer made a mistake, and that the sanction is not binding.

The Corporation, after granting sanction under s. 247 of the Act, withdrew it on the ground that the plaintiff had not complied with what it believed to be his undertaking:

Held, that the withdrawal of the sanction was not done, nor did it purport to have been done under the Act; and that the suit for damages having been based upon such withdrawal, the special limitation of three months as provided by s. 427 of the Act did not apply to it.

ORIGINAL SUIT.

ON December 6, 1898, the plaintiffs, Tullaram and Rajendro Nath Sanyal, instituted this suit against the Municipal Corporation of Calcutta, for damages, for a declaration that the order withdrawing the sanction given to the plaintiffs by the Corporation for erecting a mill was invalid, and for an injunction restraining the Corporation from interfering with the working of the mill.

The plaintiffs alleged that on June 17, 1897, the Corporation of Calcutta granted sanction for the construction by the plaintiffs of a soorkey and flour mill upon plans submitted with the application for sanction, at 102 Amherst Street in the town of Calcutta, after the site for the said mill had been duly inspected and approved of by the officers of the Health, Roads and Buildings

* Original Civil Suit No. 856 of 1898.

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Departments of the Corporation, on the plaintiff Rajendro Nath Sanyal giving an undertaking to acquire *one* hut within 25 feet on the western side of the proposed engine-house. The undertaking was in the following terms :—

“To

THE ASSISTANT ENGINEER,
Roads Department.

DEAR SIR,

WE hereby undertake to acquire and occupy the western tiled hut, which is within 25 feet of the engine-house, in compliance with the conditions proposed in the order of the Health Officer. Hoping that an immediate order granting us sanction to set up the mills will be given. We also undertake to metal the passage to the mill.

RAJENDRO NATH SANYAL.”

Dated 17th June 1897.

The plaintiff thereafter proceeded with the erection of the mill at considerable expense.

On August 15, 1897, Rajendro Nath Sanyal received a letter from the then Officiating Assistant Engineer to the Corporation, prohibiting the plaintiffs from proceeding with the erection of the said mill. The letter ran as follows :—

“To

BABU RAJENDRO NATH SANYAL.

SIR,

WITH reference to the soorkey mill shed at No. 102 Amherst Street, I am directed to inform you that the place was inspected by the Chief Engineer with the Ward Commissioner on the 12th instant, and that you should not proceed with the shed, until the huts within 100 feet all round are removed.

Dated 13th August 1897.

A. C. DUTT,
Offy. Assistant Engineer.”

And on September 10, 1897, the plaintiffs received the following letter withdrawing the aforesaid sanction granted on June 17, 1897 :—

“Letter No. 2165R.

To

BABU RAJENDRO NATH SANYAL.

SIR,

IN continuation of this office sanction No. 181, dated the 17th June last, regarding soorkey mill at No. 102 Amherst Street, I am directed by the

Chairman to inform you that the sanction given therein is withdrawn. You are requested not to proceed with the construction, until you have purchased and removed the huts within 100 feet on all sides.

A. C. DUTT,

Dated the 10th September 1897.

Offg. Assistant Engineer of Roads."

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After that Rajendro Nath Sanyal wrote to the Chairman of the Corporation to the effect that as the rains had set in, and in order to prevent the machines from getting rusty, he had no other alternative than to erect a shed according to the plans sanctioned; and that he had already purchased one hut, and asked for time to purchase the other huts as he had not covenanted to purchase them within any specified time. He also asked permission to finish the foundation work, &c. In reply he was referred, by the Secretary to the Corporation, to the letter No. 2165 set forth above, and was requested not to proceed with the construction of the mill, until the conditions mentioned therein were fulfilled.

In October 1897, the defendant Corporation ordered the prosecution of the plaintiff, Rajendro, under s. 249 of Act II (B.C.) of 1888, for constructing a tiled shed without approval of the Commissioners; and subsequently another prosecution of the said plaintiff was directed for having infringed the bye-law No. 9 made under s. 417 of the Act by constructing a tiled shed not in accordance with the plan sanctioned and approved of by the Commissioners; but both these prosecutions failed.

On September 7, 1898, the plaintiffs caused a notice to be served on the defendant Corporation to the effect that they had suffered considerable loss and damages by reason of the unlawful withdrawal of the license, dated June 17, 1897, referred to above, and for refusing to permit them to proceed with the construction of the mill; and that they would institute a suit against the Corporation to recover the damages thus sustained by them, for an injunction, &c., which was subsequently brought on December 6, 1898, as stated above.

It appears that on January 27, 1899, the plaintiffs, at the request of the defendant Corporation and before the written statement was filed in this suit, furnished the Corporation with the particulars of their claim, amounting to Rs. 8,225, with a

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note that the amount claimed would continue to increase day by day in consequence of their inability to work the mill by reason of the withdrawal of the sanction.

The defendant Corporation, in their written statement which was filed on February 27, 1893, alleged, *inter alia*, that sanction was once refused on May 21, 1897, on the ground that a mill could not be allowed to be erected within a distance of 100 feet from "dwelling-houses" or 50 feet of a road; that on June 14, 1897, the plaintiff told Mon Mohun Ghose, one of the officers of the Corporation, that he (the plaintiff) would buy all the huts within 100 feet of the proposed engine-house.

That on June 17, 1897, Khirendro Nath Gangooly, an overseer under the Corporation, reported as follows:—

"SUPERINTENDENT,

ONLY one hut on the west side will be within 100 feet of the proposed engine-house. The applicant undertakes to acquire this hut for godown, and to metal the passage. His letter of undertaking, dated June 17, 1897, is attached herewith. I think this may be sanctioned on that condition.

K. N. GANGOOLY."

The 17th June 1897.

And that accordingly on the same date, sanction was granted by the defendant Corporation for the erection of the proposed mill at No. 102 Amherst Street.

That on August 5, 1897, the said overseer reported to the Secretary to the Corporation as follows:—

"The hut has been acquired and will be used for the storage of building materials, and not as a dwelling. The road has been metalled, so H. O. [Health Office] objections have been removed."

That in August 1897, the Ward Commissioner, the Commissioner of Police, and others objected to the mill being erected on sanitary grounds, there being other huts within 100 feet of the proposed engine-house. Thereupon, the Chairman of the Corporation made the following remarks:—

"CHIEF ENGINEER,

I HAVE seen the place. This sanction appears to have been obtained by suppression [of facts] by the overseer. He reports that only one hut on the west will be within 100 feet of the proposed engine-house. He certainly omits to notice there are a number of huts within that distance on the north-west and south of

the place. The conditional sanction must be withdrawn, and the applicant must be told that he is not to proceed with the construction until he has purchased or removed the huts within 100 feet on all sides. It is not a suitable site for a soorkey mill.

The overseer should be at once suspended, and if he cannot give a proper explanation, should be dismissed.

The 8th September 1897.

W. B. "

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That on September 10, 1897, in pursuance of the direction given by the Chairman, the aforesaid sanction was withdrawn, and the plaintiff was requested not to proceed with the work, until he acquired all the huts within 100 feet on all sides of the proposed mill.

That on September 15, 1897, the Corporation received a letter from the plaintiffs' attorney to the effect that the Corporation must be held responsible for any loss or damage that would accrue to the plaintiffs by reason of the withdrawal of the sanction. Whereupon the Chairman directed that the mill should not be allowed, and that all legal and proper means should be taken to prevent it.

Mr. A. Chaudhuri (Mr. Pugh and Mr. H. D. Bose with him) for the plaintiffs. The sanction to erect the mill was given under s. 247 of the Bengal Act II of 1888, after the plans had been approved and the site inspected by the responsible officers of the Corporation. The sanction was afterwards withdrawn and the plaintiffs were prevented from proceeding with the construction of the mill, and were prosecuted in the Criminal Court. There is no provision of law under which the Corporation can withdraw a sanction already given under s. 247. The defendants have withdrawn the sanction after granting it to us, therefore the *onus* is upon them to show that they could have withdrawn the sanction, or were justified in doing so.

The cause of action in this case is (a) the withdrawal of the sanction and (b) not permitting us to build; so long as they stopped us from building, there was a continuing cause of action. We could not build on account of that withdrawal, and damage has accrued to us in consequence thereof; we had to pay rents and taxes in respect of the plot of land, and to keep up an unnecessary establishment, and our machinery has become deteriorated in

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value. The plaintiffs are therefore entitled to damages incurred by them by reason of the wrongful withdrawal of the sanction, and their consequent inability to work the mill. Sec. 427 has no application. The acts done by the Municipality do not purport to have been done under the Act.

Mr. J. G. Woodroffe and *Mr. Bagram* for the defendant Corporation. The suit in its present form is not maintainable; and it is barred by the special limitation under s. 427 of the Calcutta Municipal Act II (B.C.) of 1888. Every suit against the Commissioners must be brought within three months next after the accrual of the cause of action. The plaintiffs having based their suit on the withdrawal of the sanction, it is clearly barred under that section.

The plaintiffs cannot claim damages, which have been incurred by their own acts after the sanction was withdrawn, and they were told not to proceed with the work. They can claim only those damages which flowed as the natural consequence of the withdrawal of the sanction.

If the sanction was granted on an undertaking, and the plaintiffs failed to carry out that undertaking—there being no direct evidence as to the carrying out of the same—it is submitted that no absolute sanction was granted, and therefore there could not be any *wrongful* withdrawal of it as alleged by the plaintiffs.

The sanction was granted conditionally and without any prejudice to the rights of the parties. The Corporation has an implied right under the Act to revoke such sanction, when all the facts come to its knowledge, and the conditions are not fulfilled. Mere withdrawal of the sanction would not entitle the plaintiffs to any damages; there must be some wrongful act on the part of the Corporation before any damages could be claimed.

It is absurd to claim damages in this suit for the criminal prosecutions, it admittedly not being a suit for malicious prosecution.

The plaintiffs gave us notice of suit evidently under the Calcutta Municipal Act of 1888; and the suit having been instituted long after the accrual of the right to sue, it is barred under s. 427 of the Act. And it is for the plaintiffs to show that the cause of action upon which they are suing is not barred by limitation

Mahomed Ibrahim v. Morrison(1), *Mahomed Ali Khan v. Khaja Abdul Gunny*(2), *Mitra's Limitation* (3rd edition), p. 92. The plaintiffs are not entitled to any of the reliefs claimed by them, and the suit should be dismissed.

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Mr. Pugh in reply. All the incidents, in this case, taken together amounted to a contract, inasmuch as there was a proposal by us to erect a mill, and there was an acceptance by the Corporation by the letter granting the sanction, in consideration of the undertaking we gave them: see *Indian Contract Act*, s. 2 (d). We performed our part of the contract by acquiring the hut, but the Corporation, having given us the sanction under a contract, in the proper sense of the word, withdrew it, and we were told not to proceed with the work; and they subsequently prosecuted us criminally on two charges, which were dismissed. These acts on the part of the Corporation amounted to a breach of the contract. There is no provision in the Act authorising the Corporation to withdraw the sanction. They gave us an absolute sanction by taking an undertaking from us; their proper remedy, if any, against us would have been to apply for an injunction to enforce the undertaking. If the Corporation can legally withdraw a sanction after giving it, we have practically no remedy against them for the damages sustained by us by reason of such withdrawal.

The provisions of s. 427 of the Act do not apply to an act on the part of the Corporation constituting breach of contract.

Notice of suit is not at all necessary, when an action is brought for damages arising out of breach of contract. In the present case the notice was given as a mere matter of precaution: see *Municipality of Parola v. Lakshmandas*(3), *Ranchordas Moorarji v. The Municipal Commissioner for the City of Bombay*(4), *Shahabzadee Shahunshah Begum v. Fergusson*(5). The Corporation cannot claim the protection provided for in s. 427 of the Act, this being an action arising from breach of contract. *Austin v. Great Western Railway Co.*(6). The cause of action in this

(1) (1878) I. L. R. 5 Calc. 36.
(2) (1883) I. L. R. 9 Calc. 744.
(3) (1900) I. L. R. 25 Bom. 142.

(4) (1901) I. L. R. 25 Bom. 337.
(5) (1881) I. L. R. 7 Calc. 499.
(6) (1867) L. R. 2 Q. B. 442.

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case, namely, the withdrawal of the sanction and not permitting us to build,—is a continuing wrong: *Nityahari Roy v. Dunne*(1). I do not press for the amount of damages claimed for the criminal prosecutions. [*Mr. Bagram.* I hear for the first time to-day that this was a suit for damages arising out of breach of contract.] The particulars of the claim were given to the Corporation by our letter dated January 27, 1899, in reply to their letter dated January 14, 1899.

Cur. adv. vult.

Jan. 20.
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HENDERSON J. This suit, which is of a somewhat novel character, was filed on the 6th December 1898 to recover Rs. 7,350 as damages from the Corporation of Calcutta. The plaint is not very artistically drawn, and it is not quite clear from it what the real nature of the cause of action is, but at the request of the defendant Corporation the plaintiffs on the 27th January 1899, before the written statement was filed, furnished the particulars of their claim, so that it cannot be said that the defendant Corporation has been at all taken by surprise or have not had an opportunity of meeting the case made before me.

The case set out in the plaint is that on the 17th June 1897 the defendant Corporation granted sanction upon certain plans submitted to the plaintiffs to erect a soorkey and flour mill and the necessary sheds at No. 102 Amherst Street, after the site had been duly inspected and approved by the officers of the Health, Roads, and Buildings Departments; such sanction being granted upon the undertaking of the plaintiffs to acquire a certain hut on the west side of the proposed engine-house and within 25 feet from it. That the sanction being granted the plaintiffs proceeded at great expense with the erection of the engine and soorkey mill; that the defendant Corporation by a letter dated the 15th August 1897 directed the plaintiffs not to proceed with the completion of the work until all huts within 100 feet from the engine-house had been removed, and it is submitted in the plaint

(1) (1891) I. L. R. 18 Cal. 652.

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that the defendant Corporation had no right in derogation of the sanction granted to interfere with the work of construction. Next it is alleged that on the 10th September 1897 the defendant Corporation wrongfully withdrew the sanction, the plaintiffs having in the meantime since the 15th August, to meet the wishes of the Corporation and to avoid friction, taken various steps, which they were not bound to take. The plaint then goes on to state that two prosecutions were ordered against the plaintiff Rajendro Nath Sanyal, (1) under section 249 of Act II (B.O.) of 1888 for constructing a tiled shed without approval of the Commissioners between the 14th October and 5th November 1897, and (2) under Bye-law No. 9, sub-section 3 of section 417 of the same Act for constructing a tiled shed, not in accordance with the plan *sanctioned and approved of* by the Commissioner^s from 14th October to 15th November 1897, which prosecutions both failed, having been dismissed on the 6th September 1898. In the 9th paragraph of the plaint it is alleged that the plaintiffs incurred heavy costs and expenses and suffered serious damage owing to these prosecutions and owing to the wrongful withdrawal of the sanction, and in the 11th paragraph it is said that the cause of action is continuous and arises from day to day. Under these circumstances the plaintiffs claimed Rs. 7,350 by way of damages, and they further prayed that the order for the withdrawal of the sanction might be declared invalid and, if necessary, set aside, and for an injunction.

The following are the particulars of the claim of the plaintiffs furnished on the 27th January 1899:—

| | Rs. |
|--|-------|
| (1) Depreciation in the value of machinery ... | 1,600 |
| (2) Rents and taxes for 15 months from September 1897 to December 1898 ... | 1,200 |
| (3) Establishment charges for the same period ... | 1,725 |
| (4) Expenses incurred for defending the criminal prosecutions ... | 200 |
| (5) Amount of loss for the plaintiffs being unable to work at their mill by reason of the withdrawal of the sanction ... | 3,500 |
| | <hr/> |
| Rupees ... | 8,225 |

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A note was appended to the statement of particulars that the amounts claimed would continue to be increased day by day in consequence of the non-working of the mill.

On the 8th September 1898 the plaintiffs under section 427 of Act II (B.C.) of 1888 served the defendant Corporation with a notice of their claim. The notice which is dated the 7th September 1898 sets forth the claim of the plaintiffs somewhat more specifically than the plaint itself does.

The case for the defence is, shortly, that the plaintiffs, as a condition upon which the sanction was granted, undertook to remove all huts within a 100 feet radius of the intended site of the engine-house, or that they gave an assurance that they would do so, and that they had not complied with the undertaking or acted up to the assurance. That case, however, is not supported by the only oral testimony put forward by the defendant Corporation at the trial.

In the third paragraph of the written statement it was alleged that on the 14th June 1897 one Mon Mohun Ghose, an Assistant in the Health Department of the defendant Corporation, by appointment, met the plaintiff Rajendro Nath Sanyal at 102 Amherst Street, and was there told by him that he would buy all huts within 100 feet distance of the engine-house, but of this interview and the alleged statement made by the plaintiff Rajendro Nath Sanyal there is no evidence, Mon Mohun Ghose not having been called as a witness. It is true that there is a report by some one in the Health Department that the applicant for sanction had told him verbally that he was going to purchase huts within 20 feet of dwelling-huts, and recommending that the applicant should be told to purchase those huts first, and have a clear space of 100 feet all round the engine-house and the boiler. There is nothing to show that this report was shown to Rajendro Nath Sanyal. On the same day the late Health Officer, Dr. Simpson, made a note (Ex. 7a) as follows:—"Proper access and space of 100 feet, from dwelling-huts must be insisted on," and apparently on the 16th June further report was called for from the overseer Khirendro Nath Gangooly, who on the 17th June 1897 made the following report:—"Only the hut on the west side will be within 100 feet of the proposed engine-house. The

applicant undertakes to acquire this hut for godown and to metal the road. His letter of undertaking attached herewith. I think this may be sanctioned." On that condition (Ex. R in No. 7) sanction was accordingly granted on the 17th June 1897.

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The letter of undertaking (Ex. D) was as follows :—

"We hereby undertake to acquire and occupy the western tiled hut which is within twenty feet of the engine-house in compliance with the conditions proposed in the order of the Health officer. Hoping that an immediate order granting us the sanction to set up the mills will be given. We also undertake to metal the passage to the mill."

But in the 7th paragraph of its written statement the defendant Corporation alleges that the sanction was granted "upon the understanding that there would be no dwelling huts within 100 feet distance of the proposed mill."

The main question in the case is as to the circumstances under which the sanction was granted. As to this the evidence on behalf of the plaintiffs is not as full as it might have been, as the plaintiff Rajendro Nath Sanyal, through whom the negotiations for the sanction were carried through, has not been called, and neither the plaintiff Tullaram nor his witnesses are able to throw much, if any, light on the matter. It is said that Rajendro Nath Sanyal cannot be found; that search has been made for him in Calcutta and elsewhere, but he cannot be traced.

Before referring to the evidence as to how the sanction came to be granted, it is necessary to refer to another matter. It appears that the plaintiffs have a soorkey mill in Tewari Bagan, and they found it necessary to acquire other premises for the mill. They first applied for sanction to erect it in Machooa Bazar. This was in April 1897. The application was rejected, and the plaintiffs were informed on the 21st May that sanction was refused on the ground that a mill could not be erected within a distance of 100 feet from *dwelling-houses* or 50 feet from a road. It is contended that the plaintiffs were thus made aware of the terms upon which only applications for sanction would be granted by the Corporation, and it is said that with this knowledge they applied for sanction in respect of the premises No. 102 Amherst Street. I am not prepared to adopt

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this contention. The Municipal Act apparently draws a distinction between dwelling-houses and huts. It might well be that, finding objections to the erection of the mill at Machooa Bazar, where there were "dwelling-houses" within 100 feet, the plaintiffs turned their attention to the premises No. 102 Amherst Street, where admittedly there were only huts. The overseer himself appears (*vide* Ex. No. 7b) to have thought that the sanction in respect of Machooa Bazar was refused for the erection of the mill at Machooa Bazar because the residents of the locality objected, and not because the mill would have been within a radius of 100 feet from dwelling-houses.

Endeavours were made to show that there was a rule or practice of the Corporation to insist upon a 100 feet radius in cases such as this, but the witness, who spoke of this, failed to prove any such rule or practice. He said he knew of only one instance before the present case in which such radius was insisted upon, and that was a case in Strand Road, and it does not appear whether that was a case of dwelling-houses or huts.

The application in respect of No. 102 Amherst Street was made on the 5th June 1897, and a map or plan of the site was submitted with the application. I have already referred to some of the orders which were made by various officers upon the application, but there is nothing in the orders themselves to show that any of these officers had previously visited the site before passing these orders.

In due course the application was submitted to Khirendro Nath Gangooly, the overseer, Roads and Building Department. In his evidence he stated that he then went with the plaintiff Rajendro Nath Sanyal to No. 102 Amherst Street, examined the surrounding huts and told him that some of them were within 100 feet of the proposed engine-house, and that the Health Department would not allow that. To this the plaintiff Rajendro Nath Sanyal said nothing then. Further he said he told him that the application would have to be submitted to the Health Department first, and this was in fact done (in Exhibit 7a). Four or five days afterwards, when the opinion or report of the Health Department had been given and submitted, the

plaintiff Rajendro Nath is said to have gone again to see the overseer. Khirendro Nath Gangooly stated that he then again accompanied him to No. 102 Amherst Street, and on this occasion he professes to have measured the distances from the engine-house of the huts or of many of them which were within 100 feet and enquired (and this is very important) if they had been acquired as the plaintiff Rajendro Nath had previously stated they had been, and that the plaintiff informed him that he had acquired all the huts within 100 feet, except one on the west within 25 feet of the engine-house, and that for that hut he was then negotiating. Gangooly's evidence therefore is not that the plaintiff Rajendro Nath Sanyal stated that the huts other than the hut to the west within 25 feet were then being acquired, but that they had been acquired. This evidence is hardly consistent with statements made by the witness in various documents, which have been put in evidence and to which reference will be made hereafter. On the same day the witness stated the plaintiff Rajendro Nath Sanyal came and saw him again at his office, and pressed him to have the matter of the sanction put through at once. Gangooly stated that he told him that, unless the huts within 100 feet from the engine-house were removed, sanction would not be granted; upon which the plaintiff Rajendro Nath Sanyal said that, if he would recommend the sanction being granted, he would give a letter of undertaking, and that he thereupon wrote out the letter of undertaking (Exhibit D), which has already been set out.

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It is to be observed that the undertaking has reference to one hut only—a hut on the west within 25 feet of the engine-house, and this undertaking is said to be “in compliance with the conditions proposed by the Health Office,” that is to say, as the witness Gangooly said in his evidence, in compliance with the note of the Health Officer, Dr. Simpson (Exhibit 7a), which note the witness said was shown to Rajendra at this interview before the letter of undertaking was written out. On being asked why he had taken the undertaking in this limited form, none of the huts having then been removed, Gangooly stated that it was because the applicant had said that all the huts within 100 feet had been acquired. On the assumption that such a statement

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had been made by the applicant the acceptance of the undertaking in that form is intelligible, but still one would have expected some reference to have been made in the letter to the fact that the existing huts within 100 feet, other than the western hut close by the engine-house, had been acquired. If, however, there had been an undertaking to remove all huts within 100 feet or an assurance by the plaintiff Rajendro Nath Sanyal as alleged in the written statement, that they were being acquired and would be removed, it is difficult to understand why the full undertaking was not embodied in the letter or a reference made in it to the assurance alleged to have been given, so that it might appear that the conditions of the order of the Health Office were fully complied with. Assuming for the moment that the evidence of the witness Gangooly in this connection is true, the omission to have any reference in the letter of undertaking to the other huts within the 100 feet radius is the more remarkable when we consider a further statement made by the witness that the plaintiff Rajendro Nath Sanyal informed him that some of the huts would be removed and the others used as godowns. It would have been natural to have insisted upon some undertaking to ensure that the huts would in fact be removed, or at all events that the residents would not be allowed to remain.

So far I have dealt with the evidence as to the circumstances which led up to the granting of the sanction. The conclusions to be drawn from that evidence will be dealt with later when certain other matters have been referred to.

After the sanction had been granted as has been proved, the work of erecting the engine and soorkey mill was proceeded with, and the plaintiffs in accordance with the letter of undertaking of the 17th June 1897, took steps to acquire the hut to the west within 25 feet of the engine-house. While the work was proceeding, it appears that complaints began to be made to the Corporation by the Superintendent of the Calcutta Alms House and the residents of the adjoining bustee. Gangooly was called upon to furnish a report. His report, dated the 15th July 1897, (Exhibit T) is as follows:—

“The Health Officer’s Department did not find any objection, provided the engine-house and boiler are 100 feet away from the surrounding huts, and that

the road leading to the mill is properly metalled. The party gave a letter of undertaking to the effect that he will properly metal the road and acquire the *huts* falling within 100 feet. Consequently sanction for the hut was granted on that condition."

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Here there is no suggestion that apart from the letter of undertaking there had been any verbal undertaking or assurance with regard to any huts other than the hut within 25 feet of the engine-house.

So far from there being any such suggestion, this report incorrectly refers to the letter of undertaking as having reference not to a *hut*, but to *huts* falling within 100 feet. The reference is apparently deliberate, as the word *huts* was originally written hut, for it is clear that the letter "s" has been subsequently added, so as to make it appear that the undertaking had reference to all the *huts*. The significance, however, of this report to my mind is, that not a word is said in it to the effect that the plaintiff Rajendro Nath Sanyal had previously to the obtaining of sanction alleged that he had acquired all the huts except one within the 100 feet radius. Gangooly was unable to give any explanation as to this. On the 26th July he reported to his Superintendent that "the plaintiff Rajendro Nath Sanyal says he will build in accordance with the terms of the sanction," again no reference being made to the alleged previous acquisition of the huts. On the 4th August he reported: "He (*i.e.*, the plaintiff Rajendro Nath Sanyal) has metalled the passage. As regards huts falling within 100 feet of the mill, he says, he is making arrangements for acquiring them" (Exhibit Z 2). On the following day Gangooly's Superintendent, Mr. O'Flaherty, writing to the Secretary, apparently with reference to the letter of undertaking, stated that "*the hut* has been removed and will be used for the storage of building material, not as dwelling. The road has been metalled, so H. O.'s (*i.e.*, Health Office) objections have been removed" (Exhibit Z 3).

Mr. O'Flaherty had previously given orders (Exhibit T) that, unless *the hut* was removed and the road metalled forthwith, the sanction would be withdrawn and the mill demolished, showing that he knew of no undertaking or assurance with

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reference to any huts, except the hut within 25 feet, although Gangooly in his evidence stated that he had informed him verbally that the plaintiff Rajendro Nath had said he had, previous to the sanction, acquired all the huts except that hut. Gangooly's report of the 26th July is hardly consistent with his statement that Rajendro Nath had originally alleged that he actually acquired all the huts (save one) within 100 feet.

Up to the 5th August, therefore, it does not appear that Gangooly represented to his superior officer that the plaintiff Rajendro Nath had said that he had acquired the huts within the 100 feet radius. This suggestion in the report of the 4th August is that he had subsequently said he was acquiring them.

On the 13th August Mr. Hughes, the then Chief Engineer, visited the locality, and on the same day the plaintiff Rajendro Nath Sanyal was informed by a letter from the Assistant Engineer that he must not proceed with the building, until the huts within 100 feet all round were removed. Complaints still continuing to be made, Mr. Bright, the Chairman, on the 8th September, went to No. 102, Amherst Street, and made a note, (Exhibit 9) which is set out in the 13th paragraph of the written statement. In his note he stated that the sanction appeared to have been obtained by a *suppressio veri* of the overseer (Gangooly), who reports that "only one hut on the west will be within 100 feet of the proposed engine-house. He entirely omits to notice that there are a number of huts within that distance on the north-west and south of the place." He directed the sanction to be withdrawn, and ordered the overseer to be suspended at once, and, if he could not give a proper explanation, to be dismissed.

In his explanation (Exhibit AA) Gangooly stated that he frankly admitted that he did not make a careful examination of the site, relying upon the assurance of the owner that all huts within 100 feet would be removed before the mill was started. His explanation was not considered satisfactory, but the statement that the owner had given an assurance that all huts would be removed does not agree with his evidence. His evidence is that the owner stated that he had acquired the huts, and that he had verified the statement by making enquiries of the residents. I have no doubt

that the story now put forward by Gangooly that the plaintiff Rajendro Nath assured him that he had acquired all the huts, except one, within the 100 feet radius, is an afterthought. In his evidence Gangooly stated that up to the 24th August 1897 he had never told any one in writing that an undertaking had been given to acquire all the huts, or that the plaintiff Rajendro Nath Sanyal had said all the huts had been acquired. We have only his word for it that any such undertaking was given or statement made. If he is now speaking the truth, we should have expected some reference to this matter to have been made in his earlier notes. Even his explanation to the Chairman puts forward a somewhat different version.

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There is nothing to shew collusion between the plaintiff Rajendro Nath Sanyal and Gangooly. The former, as I have already mentioned, has not given evidence, but Gangooly's evidence negatives any such collusion. Had a case of fraud or collusion on the part of the plaintiff been proved in connection with the obtaining of the sanction, the suit would of course fail, but no such case has been made.

In arriving at a conclusion as to the circumstances under which the sanction was obtained, I preferred to rely on the report made by Gangooly himself recommending the granting of sanction and the actual letter of undertaking given by the plaintiff Rajendro Nath Sanyal, rather than upon the evidence of Gangooly at the trial or upon the statements made by him subsequently. I find that the sanction was given upon the undertaking in the letter of the 17th June 1897 (Exhibit D) and upon no other undertaking or assurance prior to the sanction being given, and, further, that the sanction was given after the premises had been duly inspected on behalf of the Corporation by its responsible officer, the overseer of the Roads and Buildings Department.

The Corporation must be taken to be bound by the acts of its officers. It is not entitled to turn round and say that it was misled by the overseer or that the overseer made a mistake, and that the sanction upon the faith of which the plaintiffs had commenced the erection of a mill and spent a considerable sum of money is not binding.

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It has been contended that the sanction was a conditional one, regard being had to the undertaking. In its terms the sanction is absolute, but the Corporation doubtless would have been able to enforce the undertaking (whatever it might be), if it were not carried out. This, however, was not the course adopted. It purported to revoke the sanction on the 10th September 1897 and then proceeded to do everything in its power to prevent the work of completing the erection of the mill shed. Threats were made from time to time to demolish the mill, suggestions were thrown out to call in the police to see the work was not begun again, and finally two prosecutions—one on the basis of a subsisting sanction and the other on the basis of there being no sanction—were started, the natural effect of which was to stop all work.

The sanction was not revoked upon the ground that the undertaking to acquire the hut within 25 feet of the engine-house was not complied with. No time, it is to be observed, was stated in the letter of undertaking (Exhibit D) for the acquisition of that hut, but it appears according to the evidence to have been acquired in September 1897, within what appears to me to be a reasonable time. The sanction was revoked or withdrawn, because the plaintiffs had not acquired or removed all huts within a radius of 100 feet from the engine-house—a thing which, as I have found, they had not undertaken to do.

On the 10th September 1897, apparently before the withdrawal of the sanction, the plaintiff Rajendro Nath had written (Exhibit No. 1) to the Corporation pointing out that his undertaking was only as to one hut, but expressing his willingness to acquire others, if time were given, and again on the 12th November 1897 he wrote (Exhibit No. 3) that he had contracted to buy other huts. It is clear therefore that the plaintiffs were anxious, if possible, to prevent friction, and were prepared to do more than they had undertaken.

That the plaintiffs suffered damage owing to the action of the Corporation, there can be no doubt. After the sanction had been granted, they took a lease of the premises on the 28th September 1897 as from the 18th July 1897, they erected the engine chimney, built the seat of the engine, laid down

the boilers, put up the soorkey mill, and did other work on the premises. They were actually stopped in building the shed to cover the engine and mill during the rains before the sanction was withdrawn. They also spent money in acquiring the hut within 25 feet of the engine-house.

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It is contended that the suit is barred by the special limitation provided by section 427 of Act II (B.O.) of 1888. It is said that the withdrawal of the sanction is a thing done or purporting to be done under that Act. The granting of the sanction undoubtedly was a thing done or purporting to be done under section 247 of the Act. Under that section the Commissioners had power to approve or disapprove of the proposed building. But it is contended that having been misled by the overseer, whose duty it was to make enquiries and report whether sanction should be granted, the Commissioners had a right under the same section to withdraw the sanction given upon his report, if upon a full knowledge of the facts they might have disapproved of the proposed building. I am unable to accept this view of the law. There is nothing in section 247 which enables the Commissioners to withdraw a sanction once given. If the Corporation was right in the view which it put forward that the undertaking of the plaintiffs had not been complied with, it had its remedy at law to compel compliance with the undertaking whatever it was.

In connection with this matter reference may be made to section 250 of the Act. Under that section, if the Commissioners fail under section 247 to pass orders within a fortnight, then the person applying for permission to build may proceed to build. In my opinion the right of the person so applying becomes absolute. The Commissioners could not be heard to say that the failure of the Commissioners to pass orders had been due to oversight, mistake, or some other like cause, nor be allowed to take steps to prevent the building proceeding. So where sanction is once given, I can find nothing in the Act, which enables the Corporation to revoke or withdraw it.

Mr. Pugh has contended that the application for sanction, the letter of undertaking (Exhibit D), and the letter granting the sanction, taken together, amount to a contract by the Corporation to permit the building to be erected, and that the withdrawal of

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the permission, accompanied or followed as it was by various other acts on the part of the Corporation, was a breach of the contract and a continuing cause of action, and on that basis he argued that section 427 of Act II (B.C.) of 1888 can have no application and he has referred me to two cases decided by the Bombay High Court—*Municipality of Parola v. Lakshman Das*(1) and *Ranchordas Moorarji v. The Municipal Commissioner for the City of Bombay*(2). If the letter granting sanction, taken with the undertaking, be viewed in the light of a contract to permit the erection of the mill, the action of the defendant Corporation in breach of the contract cannot, in my opinion, be treated as anything done or purporting to be done under the Act. The defendant Corporation withdrew the sanction and interfered with the erection of the mill, because it considered that the plaintiffs had not complied with what it believed was their undertaking, and I have no doubt that its interference was *bonâ fide*, but its proper remedy was to have taken legal steps by injunction or otherwise to enforce the undertaking. But whether the sanction amounted to a contract by the defendant Corporation or not I consider the withdrawal of the sanction was not done under the Act, nor did it purport to have been done under the Act, and therefore, so far as the suit is based upon the withdrawal of the sanction, the special limitation under section 427 does not apply. So far as the suit may be treated as based upon the prosecutions instituted by the defendant Corporation, it would appear that both prosecutions were instituted under the Act, and the claim based upon these prosecutions is therefore not barred—notice of the plaintiffs' claim having been served upon the defendant Corporation on the 7th or 8th September 1898, that is, immediately after the dismissal of the prosecutions and the suit filed on the 6th December 1898.

I have found that the sanction granted was not conditional, but absolute, that the defendant Corporation was not competent to withdraw or revoke it, and I find that having purported to withdraw or revoke the sanction, the Corporation was not justified in taking the various steps, which it did, to prevent the

(1) (1900) I. L. R. 25 Bom. 142.

(2) (1901) I. L. R. 25 Bom. 387.

plaintiffs going on with the erection and working of the mill. I have also found that no part of the claim is barred by limitation. It only remains to determine what relief the plaintiffs are, on the facts proved, entitled to.

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I have drawn attention to the 9th paragraph of the plaint in which the plaintiffs allege "that they have incurred heavy costs and expenses, and suffered serious damage owing to the two prosecutions, and owing to the wrongful withdrawal of the sanction."

The costs and expenses of the prosecutions, which were only of one of the plaintiffs, are said to amount to Rs. 200, but Mr. Pugh does not press for this sum. So far as damages are sought for in consequence of those prosecutions they are not claimed as damages for malicious prosecution, and, if necessary, I should have been prepared to hold that the prosecutions were instituted and carried through in perfect good faith. The particulars of the plaintiff's claim were furnished to the defendant Corporation on the 27th January 1899 before the written statement was filed, and I consider it would be inequitable under the circumstances to confine the claim strictly to the manner in which it is set forth in the 9th paragraph of the plaint. It is clear to my mind that the plaintiffs really meant to claim the damages which they have suffered in consequence of the defendant Corporation having prevented them erecting and working their mill, the prosecutions being only one of the methods by which the Corporation effected its object. Having regard to the repeated threats of having their mill demolished and to the prosecution of the plaintiff Rajendro Nath Sanyal, it cannot be said that the plaintiffs were not effectually prevented from erecting the mill, up to the time that the prosecutions ended in dismissal.

The relief claimed, whether it be claimed according to one contention put forward by the plaintiffs as damages arising out of a breach of contract by the Corporation or in consequence of the wrongful acts of the defendant Corporation, is sufficiently, I think, indicated by the plaint, but if not, the defendant Corporation could not be embarrassed in their defence, as it had full

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notice of the manner in which the claim was made up in the particulars which were furnished before the written statement was filed.

In my opinion the plaintiffs are entitled to such damages as they may be able to prove under the various heads set forth in the particulars of claim except as to the sum of Rs. 200, the expenses of defending the criminal prosecutions. The plaintiffs appear to have proceeded with the erection of the mill on the prosecutions being dismissed. There will be a reference to the Assistant Referee to ascertain what damages the plaintiffs have sustained under the 1st, 2nd, 3rd, and 5th heads set out in the particulars of claim. The defendants must pay the plaintiffs' costs of the hearing on scale No. 2. Costs of the reference will abide the result.

Attorney for plaintiffs: *P. N. Sen.*

Attorneys for the defendant Corporation: *Sanderson & Co.*

B. D. B.

APPELLATE CIVIL.

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June 18, 20,
23 & Aug. 18.

Res judicata—*Civil Procedure Code (Act XIV of 1882) s. 13*—*Bengal Tenancy Act (VIII of 1886) ss. 101, 102, 103, 104, 105, 106, 107, 108, 117, 118, 119, 148, 158, 189*—*Record of Rights—Survey and measurement of lands—Rules—Jurisdiction—Revenue officer—Court—Landlord and tenant—Ejection—Bengal Act VIII of 1869, ss. 38, 39—Bengal Act V of 1875.*

Sections 104-108 of the Bengal Tenancy Act (before the amendment of 1898) apply to proceedings taken under s. 103 in the same way as to proceedings taken under s. 101.

On an application under s. 103, a Revenue officer is competent to make a survey and prepare a record of rights without any order of the Government under s. 101.

When there is a total denial of relation of landlord and tenant by one of the parties, a Revenue officer has jurisdiction in a proceeding under s. 103 of the Bengal Tenancy Act to decide that question, but his decision, although it may have the force of a decree, cannot operate as *res judicata* in a subsequent suit in ejectment and for declaration of title brought in a Civil Court.

APPEAL by the plaintiff, Dharani Kanta Lahiri.

Mauza Sahildeo, appertaining to two estates, Nos. 5406 and 5407, which formed parts of pergunnahs Mymensingh and Jaffersahai, was alleged to be in the possession of the plaintiff as putnidar and as executor.

The former estate belonged to the *pro forma* defendant, who granted a putni of the same to the plaintiff.

The latter estate belonged to one Abhoy Kanta Lahiri Chowdhry, deceased, who left a will, under which the plaintiff became the executor of the said estate.

* Appeal from Original Decree No. 7 of 1899, against the decree of Babu Bepin Behari Mukerjee, Sub-Judge of Mymensingh, dated August 29th, 1898.

Appellate Bench.—Sir Henry T. Prinsep, Kt., Chief Justice, (Offg.), Mr. Justice Hill, and Mr. Justice Stevens.

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It was alleged in the plaint that the principal defendants had a *raiya* holding within mauza Sahildeo, which was sold in execution of a rent decree obtained by the predecessors of the plaintiff, who purchased the same and settled the lands with other tenants; that the said principal defendants had no title to, nor were they in possession of, any other lands in the said mauza; and that in 1892 the said Abhoy Kanta and the *pro forma* defendant, having been unable to measure the lands of the said mauza so as to enable them to make a settlement with the tenants, jointly applied to the Collector of Mymensingh for the preparation of a record of rights in respect of that mauza under Chapter X of the Bengal Tenancy Act, and that thereupon the lands of the said mauza were measured and *chittas*, *khatians* and other papers were prepared in connection therewith.

It appears that in the course of the record of right proceedings, the principal defendants, who had taken wrongful possession of some of the lands, set up a claim to about 592 bighas of land, under an ancient *sanad* alleged to have been granted by one Ganga Debya in ratification of an older one, the lands constituting a *mukarari chakk* at an annual rental of Rs. 9.

The Settlement Officer found that the *sanad* was a genuine one and held that the area covered by that document consisted of 2 *puras* or about 156 bighas only. He accordingly gave the said defendants a decree for the said 2 *puras* of land and settled rent for the excess land found to be in their possession. Thereupon the principal defendants Gaber Ali Khan and Abdul Ali Khan, as well as Bijoy Kanta Lahiri Chowdhry, minor son of Abhoy Kanta, appealed to the Special Judge, who not only found that the *sanad* was a genuine document, but also held that the whole of the lands claimed by the principal defendants were covered by the *sanad*, and decided accordingly.

There was a second appeal to the High Court from that decision, which was dismissed.

The present suit was instituted for the declaration of the plaintiff's title to the aforesaid lands, for recovery of possession of the same by evicting the principal defendants and for mesne profits. There was an alternative prayer that, if the plaintiff did not get khas possession of the lands, it might be declared that

he was entitled to get a fair and reasonable rent on account of the same. The *sanad* set up by the principal defendants in the record of rights proceedings was alleged to be a forged document and it was further alleged that the principal defendants, being wrongfully in possession of the lands in suit, and there being no relation of landlord and tenants between the plaintiff and the said defendants, the Settlement Officer had no jurisdiction to decide any question between the parties in respect of the said lands, and that his decision therefore could be no bar to the present suit. The pleas taken in defence were, *inter alia*, that the suit was barred by s. 13 of the Civil Procedure Code, that it was also barred by limitation, that the *sanad* was a valid and genuine document, and so forth.

The Subordinate Judge held on the authorities that the present suit was barred by the principle of *res judicata* in view of the decision of the Revenue Officer in the previous proceedings, and he accordingly dismissed the suit without trying the other issues on the merits.

The appeal was originally heard by GHOSH and BRETT JJ., who differed in opinion and delivered the following separate judgments:—

GHOSH J. The two plaintiffs in this case, who are the appellants before us, represent the zemindary and putni interest respectively in a certain village Sahildeo in pergunnahs Mymensingh and Jaffersahai. Their predecessors in title, Abhoy Kanta Lahiri and Jamini Kant Lahiri, applied to the Collector of Mymensingh under section 103 of the Bengal Tenancy Act for a measurement and record of rights in respect of the lands in the said village. The application was granted and an Amin was deputed by the Settlement Officer appointed in that behalf to measure the lands and to prepare the record of rights. When the measurement papers and plan were submitted to the Settlement Officer, Gaber Ali Khan and others filed a petition of objection claiming the lands, which are the subject-matter of this suit, as in their possession, under a mukarari right. This claim was opposed by the zemindars, the result being that the matter of this dispute was dealt with by the Settlement Officer as a suit between Gaber Ali Khan and others as plaintiffs and the zemindars as defendants. In support of the claim of Gaber Ali and others, they produced an old *sanad* purporting to demise certain lands within specified boundaries on a mukarari rent of Rs. 9 per annum. The Settlement Officer found the *sanad* to be genuine, but that it entitled the lessee only to 2 *puras* of lands on the mukarari title set up and ordered that the rest of the lands should be assessed with a fair rent. Both sides appealed to the Special Judge, and that officer, while affirming the view of the Settlement Officer as to the genuineness of the

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sanad, held that Gaber Ali and others were entitled to hold the whole of the lands in their possession as part of the mukarari title conferred by that document. Among other questions raised between the parties there was the question whether the whole of the lands, or which portion thereof, fell within the boundaries as specified in the *sanad*, and apparently the Special Judge was of opinion that Gaber Ali and others were entitled to hold the whole of the lands claimed by them as falling within the boundaries; at least that was the view that was accepted by the High Court in the second appeal preferred by the zemindars against the decision of the Special Judge.

As just indicated, a second appeal was preferred by the zemindars against the judgment of the Special Judge [and this could only be under section 108, clause (3) of the Act], and the points that were then raised by the zemindars were (1) that they were entitled to eject Gaber Ali and others from the lands in excess of the area covered by their *sanad*; (2) that, if they could not eject them, they were entitled to additional rent in respect of the excess area. No question, I might here state, was then raised before this Court as to the validity of the proceedings before the Settlement Officer, nor as to the jurisdiction of that officer to determine the question he did determine. The Divisional Bench, which had to deal with the appeal, was of opinion that the question of ejectment did not properly arise in the proceedings, the suit being not one in ejectment, and no issue on that point having been raised between the parties. But they held at the same time that the Special Judge had found upon the evidence that Gaber Ali and others were entitled to the whole of the lands claimed by them as covered by the boundaries as given in the *sanad* in the mukarari title at the annual rental of Rs. 9, and accordingly the learned Judges dismissed the appeal of the zemindars.

Subsequently the present suit was brought by the plaintiff for a declaration that the defendants Gaber Ali and others had no mukarari title or tenancy right in respect of the lands claimed by them and for recovery of possession of the same; and failing that, for a declaration that the plaintiff is entitled to receive a fair and reasonable rent for the lands.

The suit has been dismissed by the Subordinate Judge upon the ground that it is barred by *res judicata* under section 18 of the Civil Procedure Code, having regard to the judgments in the previous proceedings under Chapter X of the Tenancy Act.

Against this judgment the plaintiff has appealed to this Court, and the learned Advocate-General on his behalf has contended in the first place that the proceedings held by the Settlement Officer could not be regarded as proceedings for a record of rights as contemplated by Chapter X of the Bengal Tenancy Act; that no such record could have been prepared, nor any survey of the lands could have been made without the orders of Government, obtained under section 101 and that such orders have not been produced; that the Settlement Officer had no authority to make a survey, which could only be made by an officer empowered under the Bengal Survey Act of 1875, and it has not been shown that such power was conferred upon that officer; that the record of rights could not have been made without such survey; and that sections 105, 106, and the following sections in Chapter X have no application to the proceedings before the Settlement Officer under

section 108 of the Act. It has been next contended that the Settlement Officer had no power to determine the question of the validity or otherwise of the *sanad* produced by the defendants, and therefore the decisions arrived at in the settlement proceedings do not operate as *res judicata*, and further that the question whether the whole of the lands are covered by the said *sanad* can only be and should be determined in this case.

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With regard to the first contention raised, I observed that no such contention was raised in the course of the proceedings under section 108 of the Act, nor in the Court below. On the contrary we find it distinctly stated in paragraphs 6 and 8 of the plaint, that the plaintiff's predecessors in title having been unable to measure the lands in the village Sahildeo applied to the Collector for a preparation of record of rights in respect of the lands in the said village under Chapter X of the Bengal Tenancy Act, and that thereupon the lands were measured, *chittas* *khattas* and other papers prepared in connection therewith; that in course of the record of right proceedings, the defendants claimed the lands under a mukarari title, and though there was a decision by the Special Judge in their favour, yet it was unjust, and that the High Court dismissed the second appeal preferred against the said decision, simply because there was no error of law, thereby clearly indicating that the proceedings in connection with the survey of the lands that was effected and the record of rights were in accordance with Chapter X of the Bengal Tenancy Act. No doubt in a later paragraph of the plaint, the plaintiff alleges, that the Settlement Officer had no jurisdiction to decide any question between the parties in respect of the said lands, but this is, as stated in the plaint itself, because the defendants were wrongfully in possession of the lands and there was no relationship of landlords and tenants between the parties. And upon this ground it is alleged that the record of rights proceedings could not be any bar to a title suit under the ordinary law of the land. In short, what the plaintiff questioned in the Court below was not, the validity of the proceedings as taken under Chapter X, or the survey and measurement made in the course of those proceedings, but the authority of the Settlement Officer to decide the particular questions of title which he decided. That being so, I am of opinion that it is now too late to question the validity of these proceedings, and it seems to me that the contention raised before us by the learned Advocate-General involves, to some extent at least, consideration of certain questions of facts, which were not raised in the Court below; and it would be unfair to the defendants to allow such questions being raised in the appellate stage of the case [see in this connection *Mahomed Mira Ravuthar v. Savvasi Vijaya Raghunadha Gopalar*(1)].

My learned colleague, however, is of opinion that the question raised before us is one of jurisdiction, pure and simple, and that we are bound to take cognizance of it, though it was not raised in the Court below, nor in course of the proceedings under section 108 of the Act; and it becomes therefore necessary to deal with it.

If the question were raised under the Bengal Tenancy Act, as it now stands, I should have thought that the matter was clear enough (see sections 108, 103A, 103B,

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105, 106 to 109A). But the question has to be dealt with with reference to the provisions of the Act, before it was amended by the Amending Act.

Section 101 of the Act provides that the Local Government may order a survey and record of rights being made in respect of the lands in a local area. Section 102 prescribes the particulars to be recorded, when such an order is made. Section 103 provides that an application being made by a proprietor or tenure-holder, a Revenue officer may, subject to and in accordance with the rules made by Government, ascertain and record the particulars specified in section 102. Section 104 lays down (among other matters) that "in any proceeding under this chapter," the Settlement Officer may, when the landlord or the tenant applies for settlement of rent, settle a fair and equitable rent. Section 105 provides that "when a Revenue officer has completed a record made under this chapter, he shall cause a draft thereof to be published." And then we have section 106, which says as follows:—

"If at any time before the final publication of the record under the last foregoing section a dispute arises as to the correctness of any entry (not being an entry of a rent settled under this chapter) or as to the propriety of any omission, which the Revenue officer proposes to make or has made therein or therefrom, the Revenue officer shall hear and decide the dispute."

Section 107 provides that "in all proceedings for the settlement of rents under this chapter and in all proceedings under the last foregoing section, the Revenue officer shall, subject to rules made by the Local Government under this Act, adopt the procedure laid down in the Code of Civil Procedure for the trial of suits, and his decision in every such proceeding shall have the force of a decree."

Section 108 no doubt does not use the expression "record of rights" as occurring in section 101; nor does it speak of a survey being made; but it seems to me that where it provides for the ascertainment and "record of the particulars specified" in section 102, it necessarily implies a record of rights and a measurement of the lands being made. It will be observed that among the particulars to be recorded are (1) the class to which the tenant belongs, and, if he is a tenure-holder, whether he is a permanent tenure-holder or not, and whether his rent is liable to enhancement, the rent payable and the mode in which the rent has been fixed, and the special conditions and incidents of the tenancy (or in other words, a record of the rights of the tenant is to be made); (2) the situation, quantity and boundaries of the land held by the tenant; and this could not be done without a survey and measurement of the land being made. In this view of the matter, section 103 provides for the preparation of the record of rights and a survey of the lands as contemplated by sections 101 and 102 of the Act. In this connection I might refer to section 189 of the Act, which empowers the Government to confer upon a Revenue officer appointed to discharge any duty under the Act the power to enter upon any land and to make a survey thereof and exercise the powers exercisable by any officer under the Bengal Survey Act, 1875, as also any power exercised by a civil court in the trial of suits. And referring to some of the rules made by the Bengal Government under this section, we find that Rule I in Chapter VI (record of rights and settlement of rent and the powers of Revenue officers) provides that Revenue officers appointed to be Settlement Officers or Assistant Settlement Officers for the purpose of making

survey, record of rights, settlement of the rents, determination of the proprietors' private lands and such like proceedings, are vested with all powers exercised by the civil court in the trial of suits and the powers mentioned in section 189 (I) (a), (b) and (c) of the Bengal Tenancy Act. Under clause (1) (b) of the section, power might be given (as already mentioned) to enter into any lands, and to survey, demarcate and make a map of the same, and any power exercisable by any officer under the Bengal Survey Act, 1875. And I find, on looking into the Quarterly Civil List, that the officer who held the record of rights proceedings in this case was appointed by the Government as a Settlement Officer; so that the officer may be taken to have possessed the power to make a survey of the lands and prepare a record of rights. Referring then to Rule 3 of the same chapter, we find it laid down that the following processes should ordinarily be comprised in a cadastral survey, record of rights, and settlement of rents, viz., demarcation of boundaries, measurement, testing of measurement, record of rents and rights and determination of fair rents. Rules 37 to 47, which relate to section 103 of the Bengal Tenancy Act, provide for applications by proprietors for survey and record of rights, power being given to the Commissioner and the Board of Revenue for granting such applications and directing operations under that section, it being also provided that the Revenue officer should proceed in accordance with the rules for guidance of officers acting under orders made under section 101 of the Bengal Tenancy Act. And turning to Rules 16 to 23 we find how the rights of tenureholders, raiyats and raiyats claiming lands at fixed rates are to be recorded in course of a proceeding for the record of rights. It has, however, been said that section 103 should be taken to stand by itself, that no power is given by that section to make a survey and measurement, that it does not confer, as section 101 does, upon the Government authority to invest Revenue officers with powers to make such survey and measurement, and that no rule framed, or order passed by Government, could confer upon a Revenue officer acting under section 103 powers which that section does not authorize Government to confer. I regret I am unable to accept this view, and I am not prepared to say that the rules framed by Government are *ultra vires*. I may here observe that survey is very often made and record of rights prepared in proceedings under section 103 by Revenue officers in accordance with the rules framed by Government, and in cases of disputes decided by such officers under section 106 which have come up to this Court, no objection on the ground of want of jurisdiction was ever raised. And if we were now to hold that such proceedings are without jurisdiction, many of the rights declared under those proceedings would be disturbed. But supposing that the order of Government was *ultra vires* and that the Settlement Officer had no lawful authority to make a survey under the Survey Act, 1875, it seems to me, as already explained, that in order to enable the Settlement Officer to prepare a record of rights under section 103, he had necessarily the authority to make a survey and measurement of the lands. Whether such survey could be made under the Survey Act or not is immaterial from the point of view I take; and when such survey and measurement were made they would be perfectly legal proceedings.

Section 104 of the Act contains provisions supplementary to both sections 103 and 101. It is not, however, necessary to discuss this section, for no application for

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ement of rent seems to have been made in the proceedings before the Settlement Officer. It will be sufficient to say that a settlement of rent under this section may be made in course of a proceeding under section 108 as in a proceeding under section 101.

Section 105 speaks of a "record under this chapter" and of the Revenue officer finally framing "the record" and publishing the same. This I think includes a record under section 108, and when section 106 speaks of a dispute arising "at any time before the final publication of the record under the last preceding section as to the correctness of any entry" made by the Revenue officer, it contemplates a dispute arising in the course of a proceeding under section 108 or section 101, as the case may be, and when under section 107 a Revenue officer is enjoined to adopt the procedure laid down by the Civil Procedure Code for trial of suits "in all proceedings under the last foregoing section," it has to do so in a proceeding under section 108 as in a proceeding under section 101, when before the final publication of the record a dispute arises as to an entry made by him in the record. The decision of the Revenue officer determining such dispute has the force of a decree. If the decision of the Revenue officer has the force of a decree, it is obvious that the provisions of section 108, which provide for an appeal lying to the Special Judge, and a second appeal to the High Court, apply to a proceeding under section 108 of the Act, and I may here state that proceedings taken under sections 108 and 104 of the Act have always been regarded by this Court as proceedings for records of rights, and to which sections 106 to 109 are applicable. See *Dengu Kazi v. Nobin Kessori Chowdhurani*(1), *Achha Mian Chowdhry v. Durga Churn Law*(2), *Ram Autar Singh v. Sanoman Singh*(3), and *Durga Churn Law v. Basir Mandal* (4).

Turning to the next point raised before us as to the authority of the Settlement Officer to determine the question of the validity or otherwise of the *sanad* and whether any portion of the lands claimed fell within the boundaries thereof. Under section 108 of the Bengal Tenancy Act, a Revenue officer may ascertain and record all or any of the particulars specified in section 102 of the Act. That section provides (among other matters) as already indicated for the recording of (a) the name of each tenant, (b) the class to which the tenant belongs, *viz.*, whether he is a tenure-holder, raiyat holding at fixed rates, occupancy raiyat, and if he is a tenure-holder, whether he is a permanent tenure-holder, (c) the situation and boundaries of the land held by him, (e) the rent payable, (f) the mode in which that rent has been fixed, whether by contract, by order of court or otherwise, and (h) the special conditions and incidents of the tenancy. The Settlement Officer in this case had to find who the tenant was that held the land in question. Gaber Ali claimed to be the tenant, and necessarily the Settlement Officer had to determine whether he was the tenant. He had also to find the rent payable by him, if he was tenant, and he had further to find the mode in which that rent was fixed and the special conditions and incidents of the tenancy. The *sanad* was the document that was produced as showing that Gaber Ali was the tenant, how the rent payable by him was fixed, and shewing also the incidents and conditions of the tenancy. The Settlement Officer had, therefore, to determine whether the document was genuine

(1) (1897) I. L. R. 24 Calc. 462.

(3) (1899) I. L. R. 27 Calc. 167.

(2) (1897) I. L. R. 25 Calc. 146.

(4) (1901) 6 C. W. N. 298.

and valid, whether the rent was mukarari or not, and also which portion or portions of the lands claimed by him fell within the boundaries of the lands demised by that document. These were matters not incidental but essential for the preparation of the record of rights, which the zemindars had applied for; and the Settlement Officer was perfectly within his rights in determining them. It has, however, been contended that the law contemplates the case of an admitted tenant, and not a tenant, whom the zemindar does not recognize as the tenant, as it was in this case, but I am unable to accept this contention as correct, for the Settlement Officer has to find out in respect of each plot of land, who the tenant was, and it seems to me that, if the contention were correct, the result would be simply disastrous; for the zemindar might, under the colour of a proceeding for record of rights, sweep away a whole body of tenants, leaving them to establish their rights in a civil court, and surely the Legislature could not have contemplated such a result. I am of opinion, therefore, that the Settlement Officer had jurisdiction to determine the questions, which he did determine.

The dispute as to the tenancy right of Gaber Ali and others having been raised before the Settlement Officer, the matter of that dispute had to be dealt with under section 106 as a suit between the parties concerned. Under section 107, as already stated, the Settlement Officer had to proceed according to the procedure prescribed by the Code of Civil Procedure. And his decision had the force of a decree, and unless set aside in appeal would be final. Under section 108 such decision was appealable (and there was an appeal preferred) to the Special Judge, and that officer in dealing with the appeal before him followed the procedure prescribed by the Procedure Code, and he dealt with the appeal accordingly. The decision that he pronounced was appealable again to the High Court, and an appeal having been preferred by the zemindar, the Court dealt with it, and it was held that the whole of the lands claimed by Gaber Ali and others, and in their possession, were covered, as found by Special Judge, by the *sanad*, and accordingly dismissed the appeal. These judgments, I think, operate as decrees between parties, and it follows that the present suit is barred by the rule of *res judicata* as laid down by section 13 of the Code, see *Ram Autar Singh v. Sanoman Singh*(1), also the other cases already referred to.

Upon these grounds I am of opinion that this appeal fails, and that it should be dismissed with costs.

But as my learned brother differs from the views I have expressed, the case will be referred, under section 575 of the Code, to one or more of the other Judges as the Chief Justice may appoint in that behalf.

Let it be placed before the Chief Justice for orders.

BRETT J. The plaintiff and defendant No. 3 have taluqdari and zemindari rights, respectively, in mauza Sahildeo, and they jointly applied, under section 108 of the Bengal Tenancy Act, to the Collector of Mymensingh to have the particulars specified in section 102 of the same Act ascertained and recorded by a Revenue officer in respect to that mauza. In the course of those proceedings the defendants Nos. 1 and 2 were found to be in possession of certain lands in the mauza. The defendants claimed to hold all these lands as a mukarari chak under a *sanad*

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granted by one Ganga Debya Chandhurani to one Jehangir Khan. The plaintiff, on the other hand, asserted that the defendants were wrongfully in possession of all the lands, that the *sanad* was a forgery, and that they had no right whatever to the lands. The Revenue officer appears to have enquired into this dispute, and in the end he came to the conclusion that the *sanad* was a genuine document, but that it covers 2 *puras* or 156 bighas only out of the land in the possession of the defendants, which amounted to 592 bighas. The defendants appealed to the Special Judge, who confirmed the finding of the Revenue officer as to the genuineness of the *sanad*, but further held that it covers all the lands in the possession of the defendants. A second appeal was preferred to the High Court, which was dismissed on the 9th July 1895.

The present suit was instituted on the 8th July 1896 for a declaration of plaintiff's right to all the lands in the possession of the defendants and for a further declaration that the defendants Nos. 1 and 2 have no mukarari chakk right as tenancy right in any of them. There were also prayers for eviction and for mesne profits with interest. An alternative prayer was added that, if the plaintiff does not get khas possession of the lands, he be declared to be entitled to a fair and reasonable rent for the same. In defence *inter alia* it was pleaded that the suit was barred by the provisions of section 13 of the Code of Civil Procedure, and this is the only part of the defence which, for the purposes of this appeal, it is necessary to consider.

The Subordinate Judge held, as the questions raised in this suit had formed the subject of the case between the same parties before the Revenue officer in the course of the proceedings instituted under section 103 of the Bengal Tenancy Act, as that case was a suit within the meaning of the Code of Civil Procedure, and as the questions now raised were duly tried and decided in that suit and the appeals arising out of that suit, that the questions were *res judicata* between the parties, and that the present suit was barred by section 13 of the Code of Civil Procedure. The plaintiff has appealed to this Court.

The contentions advanced by the learned Advocate-General on his behalf are as follows:—

(1) The question in dispute between the present parties in the proceedings under section 103 of the Bengal Tenancy Act was not one which the Revenue officer had jurisdiction to entertain. It was not a dispute between a landlord and a tenant. The plaintiff asserted that the defendants were trespassers and had no right to remain on the land as tenants. The defendants asserted that they held the whole of the land in their possession under a mukarari title. They relied on a *sanad* which the plaintiff alleges to be a forgery. The whole dispute was one of title and not one which could have been entertained by a Revenue officer in proceedings to ascertain and record the incidents of a holding. It could only be decided in a regular suit by a Civil Court. The fact that the Revenue officer came to a decision in those proceedings and that his decision was upheld in appeal would not confer on him a jurisdiction with which he was not vested by law.

(2) The proceedings taken by the Revenue officer were under section 103, Bengal Tenancy Act, and under that section only. Section 104 of the Act is not complementary to section 103, but is entirely distinct; and further this was not a case in

which a tenant was holding land in excess of, or less than, that for which he was paying rent. Nor was it a case in which application had been made by a landlord or a tenant for a settlement of rent.

(3) A Revenue officer acting under section 103, Bengal Tenancy Act, has power only to ascertain and record the particulars specified in section 102 of the same Act in respect of any estate or of the holdings included therein. No power can be conferred on him by any authority under that section to survey the lands or to prepare a record of rights as contemplated by section 101 of the Act. Under section 101 the Local Government is empowered to order a survey in proceedings under that section, but section 103 gives the Local Government no such power. The only authority which could otherwise order that a survey be made in such a case would be the Lieutenant-Governor under section 3 of the Survey Act V (B.C.) of 1875. And if the Local Government has no power under the law to order proceedings under section 103 of the Act that a survey be made, it could not give itself such power by a rule issued under section 189 of the Act, directing that in conducting operations under section 103, the Revenue officer shall proceed in accordance with the rules for the guidance of officers acting under orders made under section 101. Nor could it by such a rule confer the power of the Revenue officer to make a survey.

(4) A record of rights such as is contemplated by section 101 of the Bengal Tenancy Act can only be made after a survey duly authorised by law. The fact that in proceedings under section 103 the Revenue officer may have taken upon himself to make a survey and to prepare what purported to be a record of rights would not of itself give him a jurisdiction which the law did not confer upon him, and such being the case, his proceeding in disposing of the dispute between the present parties could not fall within the provisions of sections 106 and 107 of the Act, nor would it be a suit as contemplated by the Code of Civil Procedure so as to give to his decision therein the force of a decree.

There was, therefore, no judicial decision of the points in dispute between the parties either before the Revenue officer or the Courts of appeal, which could operate as *res judicata* to bar the present suit.

In opposition to the above the following arguments were put forward on behalf of the defendants respondents. It is contended that section 103 of the Bengal Tenancy Act cannot be regarded as standing alone, nor are proceedings taken thereunder excluded from the provisions of section 104 of the Act. The rule passed by the Local Government under section 189 of the Act, directing that in conducting operations under section 103 the Revenue officer shall proceed in accordance with the rules for the guidance of officers acting under orders made under section 101, gave to the Revenue officer power to make a survey and prepare a record of rights in the same manner as in a proceeding under section 101 of the Act. In the present case the Revenue officer had therefore power to make a survey and to prepare a record of rights. Section 105 applied to his proceedings and so also section 106 when the dispute arose between the two parties. Under the provisions of section 107 of the Act proceedings under section 106 are to be dealt with as suits, and decisions in such proceedings are given the force of decrees. This view, it is urged, was accepted by this Court in the case of *Achha Mian Chowdhry v. Durga Churn*

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Lau(1), which was a case arising out of proceedings under section 103 of the Tenancy Act.

It was further contended that under section 103 of the Tenancy Act the Revenue Officer had power to ascertain the incidents of the defendants' holding, and that he could only do this after determining the question of the mukarari title, which they set up. He had therefore under the law full power to determine that question in a dispute between the parties; and as his decision in that proceeding amounted to a decree, he, as a Court of competent jurisdiction, had heard and finally decided that question, and section 13 of the Code of Civil Procedure barred the plaintiff from again raising it in the present suit. To support this view, the case of *Ram Autar Singh v. Sanoman Singh*(2) was relied on, as also the case of *Gokul Sahu v. Jadu Nundun Roy*(3). The latter case was further referred to in refutation of the argument of the other side that the jurisdiction of the Revenue officer was ousted by the denial on the part of the plaintiff of the defendants' tenancy.

Objection was also taken to the appellant being allowed to raise in appeal the point that the Revenue officer had no jurisdiction in a proceeding under section 103 of the Tenancy Act to make a survey or prepare a record of rights on the ground that the point was not raised in the Court of first instance, and that to allow him to raise it in appeal might lead to injustice, and was contrary to the principle referred to by the Privy Council in the case of *Mahomed Mira Ravuthar v. Savvasi Vijaya Raghunadha Gopalar*(4).

The main question which is raised in this appeal is, however, whether the Revenue officer had or had not jurisdiction to decide the question in dispute between the plaintiff and defendants in the proceedings under section 103 of the Tenancy Act. That question appears to me to be a pure question of law, and not to be one on which evidence could or would have been given in the Court of first instance. It is not, therefore, such a point as was referred to by the Privy Council in the case relied on by the respondents, and I do not think that the objection raised by the respondents to its consideration can be sustained.

The chief point which has been argued before us in support of the appeal does not appear to have been argued or considered in any of the cases to which we have been referred. Objection has been raised to its being taken into consideration in this appeal on the ground that it was not expressly set out in the plaint, nor in the ground of appeal, and it is suggested that it is hardly consistent with the case put forward by the plaintiff. The points taken are, however, covered by the grounds of appeal, and it is impossible to say that they are inconsistent with the appellants' case in the lower Court. The arguments which have been advanced in this Court no doubt did not occur to the learned pleaders who appeared for the appellant in the lower Court, but that is no reason why learned counsel in this Court should be confined in arguing a point of law to the arguments used in the Court of first instance. The objection is not tenable.

In brief, the point taken is that section 103 of the Bengal Tenancy Act must be taken to stand alone, and a proceeding taken under it cannot fall within the provisions of sections 104, 105, 106, or 107 of the Act, because no power is given by

(1) (1897) I. L. R. 25 Calc. 146.

(2) (1899) I. L. R. 27 Calc. 167.

(3) (1890) I. L. R. 17 Calc., 721.

(4) (1899) I. L. R. 23 Mad. 227.

section 103 to any authority to order or to make a survey or measurement for the purposes of that section, and that as sections 104 and 106 presuppose such a survey and measurement before a settlement of rent or the preparation of a record of rights as contemplated by section 101 of the Act, those sections cannot apply to such proceedings or to disputes arising in those proceedings. The provisions of sections 106, 107, and 108, or section 148 of the Act cannot be taken as applicable to these proceedings so as to make any matters decided therein *res judicata* between the parties in a subsequent suit in the Civil Court.

There can be no doubt that, if sections 106 and 107 apply to the proceedings of the Revenue officer in this case, then his proceedings in dealing with the dispute between the two parties would be a suit, an appeal against such decision would lie, and the provisions of section 13 of the Code of Civil Procedure would bar the present suit [see *Dengu Kazi v. Nobin Kissori Chowdhrami*(1), *Ram Autar Singh v. Sanoman Singh*(2), *Gokkul Sahu v. Jodu Nandan Roy*(3), and *Joypal Dhoti v. Palukdhari*(4)]. In none of these cases, however, excepting that of *Dengu Kazi v. Nobin Kissori Chowdhrami*(1), does it appear that the proceedings were instituted under section 103 of the Bengal Tenancy Act,—in fact they appear to have been instituted under section 101 of the Act.

In the case of *Dengu Kazi v. Nobin Kissori Chowdhrami*(1) and in the case of *Achha Mian Chowdhry v. Durga Churn Law*(5), the original proceedings appear to have been instituted under section 103 of the Act, but in these cases the question does not appear to have been considered or argued, whether in proceedings instituted under section 103 of the Act the landlord could apply for a settlement of rents under section 104. What appears to have been held was, that, if in such a proceeding the landlord applied for a settlement of a fair rent under section 104 of the Act, then under the rules issued by the Local Government under section 189 of the Act, the proceedings of the Settlement Officer must be dealt with as if it were a suit under the Act, and the provisions of the Code of Civil Procedure would apply to such a case.

In the present case I am unable to find that any application for the settlement of fair rent was made under section 104 of the Act either by the landlord or the tenant, supposing that such an application could be made in a proceeding under section 103 of the Act. In paragraph 6 of the plaint it is no doubt stated that the plaintiff and defendant No. 3 having been unable to measure the lands of mauza Sahildeo to effect a settlement with the tenants jointly applied to the Collector of Mymensingh for the preparation of a record of rights in respect of the said mauza under Chapter X of the Bengal Tenancy Act, VIII of 1885, and therefore the lands of the mauza were measured, &c. It is not, however, stated that any application was made under section 104 of the Act.

What appears to have happened is that the amin who was deputed to ascertain the particulars specified in section 103 of the Tenancy Act in respect of all the lands in mauza Sahildeo entered all the lands which he found to be in the possession of the defendants as ordinary raiyati lands. Thereupon the defendants

(1) (1897) I. L. R. 24 Calc. 462.

(3) (1890) I. L. R. 17 Calc. 721.

(2) (1899) I. L. R. 27 Calc. 167.

(4) (1898) 2 C. W. N. 491.

(5) (1897) I. L. R. 25 Calc. 146.

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put in an objection to the Revenue officer, alleging that the lands were all included in their mukarari chakk, which they said they held under a *sanad*, which they produced. The plaintiff denied the defendants' mukarari right and the genuineness of the *sanad*, alleged that they were trespassers, and apparently sought to have them ejected. The decision of the Revenue officer was partly in favour of the defendants' claim, and both sides appealed to the Special Judge. That officer found wholly in favour of the defendants, and the present plaintiff appealed to the High Court. His appeal was dismissed.

The dispute between the parties was certainly not with regard to the settlement of fair rents for the land, but was in respect to the title set up by the defendants; and it seems hardly possible to hold that the decision arrived at as to the defendants' title was one which it was necessary to determine for the purpose of fixing fair rents on the lands in the holding, and, such being the case, I am of opinion that the Revenue officer had not jurisdiction to decide the points in dispute, but that he should have referred the parties to the Civil Court.

The more important point for determination is, however, whether in proceedings under section 103 of the Tenancy Act an application could be made under section 104 for the settlement of the rents. In my opinion, the view propounded by the learned Advocate-General is correct, and no such application could be made. No settlement of rent could be made under that section without a previous survey and measurement of the lands, and no such survey or measurement could be made unless under authority given by the law. The fact that a party applied for a settlement of the rents could not give to the Revenue officer a power which could not be conferred on him under the law. Nor could the practice followed by Revenue officers of making surveys and measurements in proceedings instituted under section 103 give them such a power. The provisions of section 103 do not confer on the Local Government any authority to invest the Revenue officer with such a power, and in the absence of special authority given under that section, the power could apparently only be conferred by the Lieutenant-Governor under the Survey Act, V (B.C.) of 1875. It is not suggested that any such power was given to the Revenue officer in the present case.

Section 101 of the Act gives to the Local Government specifically powers to make an order that a survey be made and a record of rights prepared in proceedings under that section, and under section 189 of the Act the Local Government has power to make rules consistent with the Act to regulate the procedure to be followed by Revenue officers in the discharge of any duty imposed upon them by or under the Act, and by such rules to confer upon any such officer any power exercised by a Civil Court in the trial of suits. But no rule passed under section 189 of the Act could operate to confer on a Revenue officer, acting under section 103 of the Act, powers which that section does not authorise the Local Government to confer, nor would it enable the Government, as the rule relied on by the defendants is said to do, to extend powers which the law authorises the Local Government to confer on a Revenue officer only when he is conducting proceedings under section 101 of the Act, to such an officer when he is carrying out proceedings under section 103. Neither by the law nor by rule could the power to make a survey and measurement be conferred by the Local Government on a Revenue officer acting under section 103 of the Tenancy Act.

The provisions of section 104, and equally also the provisions of sections 105 and 106, presuppose that the Revenue officer had power to make a survey and measurement and to prepare a record of rights. And it then follows that, if the Revenue officer had not and could not have such a power in a proceeding under section 103, the provisions of sections 104, 105 and 106 cannot be taken to apply to his proceedings. The provisions of sections 107 and 143 of the Act equally therefore cannot apply, and his proceedings, under the circumstances, cannot be dealt with as a suit, and his decision cannot have the force of a decree.

The rulings relied on do not, therefore, apply to the present case, and I feel bound to hold that, in spite of the fact that the decision of the Revenue officer was, in the previous proceedings, appealed against to the Special Judge, and there was afterwards a second appeal from the decision of that officer to the High Court, yet the decision in those proceedings cannot be taken to operate under section 13 of the Code of Civil Procedure as a bar to the present suit.

In my opinion, therefore, the judgment and decree of the Lower Court cannot be supported. They must be set aside and the case remanded to that Court for trial on its merits. Costs to abide the result.

THE appeal was then referred under section 575 of the Civil Procedure Code to a Special Bench constituted for the purpose.

Advocate-General (Mr. J. T. Woodroffe) (Dr. Rashbehary Ghose, Babu Jogesh Chandra Roy and Babu Taruck Chandra Chakravarti with him) for the appellant. The question, which arises under the old Act is, does the grant of an application by a landlord under s. 103 of the Bengal Tenancy Act authorise in itself a survey or a record of rights, or should there be foundation of authority under s. 101? In this case there was no order as to survey or record of rights under s. 101, nor was there any application to settle a fair rent.

It is submitted (1) unless there is an order under s. 101, proceedings under s. 103 are void and of no effect; (2) if proceedings under s. 103 can be initiated without the promulgation of an order under s. 101, the record, &c., which the Revenue officer may make will not be recorded under Chapter X, within the meaning of ss. 106 and 107, and consequently the decision would not have the force of a decree; (3) the disposal of the objection in this case having been made before the publication of the record of rights, there was no decision under s. 107; (4) the alleged tenancy not being admitted and the question being whether or no the defendants were tenants, the Settlement Officer

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was not competent to try it; (5) it being held in the proceedings so taken and disposed of that no question as to the power to eject could be decided, there was no decision upon that point [HILL J. As the defendants set up the order as a final decree, it is for them to prove that all the conditions exist for a *res judicata*.] Yes.

The following cases were referred to:—*Gokhul Sahu v. Jodu Nundun Roy*(1); *Pandit Sardar v. Meajan Mirdha*(2); *Secretary of State for India v. Nitye Singh*(3); *Dengu Kazi v. Nobin Kisor Choudhrani*(4); *Kurban Ali v. Jafar Ali*(5); *Aohha Mian Chowdhry v. Durga Churn Law*(6); *Ram Autar Singh v. Sanoman Singh*(7); *Troylokhyanath Bose v. Macleod*(8); and *Durga Churn Law v. Basir Mandal*(9). [HILL J. In all these cases there was an admitted tenancy.] Yes, all the cases proceeded on the basis of existing tenancy, but here the question was whether the defendants were not trespassers.

Babu Dwarka Nath Chakravarti for the respondents. S. 103 is independent of s. 101. The former contemplates a small area, the latter refers to a survey or record of rights within a local area. The rules under the Act make the matter clear. [PRINSEP C. J. The principal question is, was there a tenancy?] The first entry is the name of the tenant; the Revenue officer has therefore to decide whether the man was a tenant. Denial of relation of landlord and tenant does not oust jurisdiction. In the case of *Secretary of State for India v. Nitye Singh*(3) that contention was raised by the respondent, but not given effect to. See also *Joypal Dhobi v. Palukdhari*(10); *Karmi Khan v. Brojo Nath Das*(11); *Upadhya Thakur v. Persidh Singh*(12). To sum up, there is no distinction between proceedings under sections 101 and 103, except as to the way of initiating them, and when a dispute arises, the decision is a decree and bars a fresh suit. *Durga*

(1) (1890) I. L. R. 17 Calc. 721.

(2) (1898) I. L. R. 21 Calc. 378.

(3) (1898) I. L. R. 21 Calc. 38.

(4) (1897) I. L. R. 24 Calc. 462.

(5) (1901) I. L. R. 28 Calc. 471.

(6) (1897) I. L. R. 25 Calc. 146.

(7) (1899) I. L. R. 27 Calc. 167.

(8) (1900) I. L. R. 28 Calc. 28.

(9) (1901) 6 C. W. N. 288.

(10) (1898) 2 C. W. N. 491.

(11) (1894) I. L. R. 22 Calc. 244.

(12) (1896) I. L. R. 23 Calc. 728.

Churn Law v. Hateen Mandal(1) and *Ram Awar Singh v. Sanoman Singh*(2).

Dr. Rash Behary Ghose in reply. The question as to whether the matter in this suit was *res judicata* must depend upon section 13 of the Civil Procedure Code. Section 107 of the Bengal Tenancy Act only says that the decision of the Revenue officer is a decree; it does not deal with estoppels. The Revenue officer had no jurisdiction to try the present action and to determine a question of disputed tenancy. Even if he had, his decision would be on a collateral matter. See *Peary Mohun Mukerjee v. Ali Sheikh*(3), *Debendro Kumar Bandopadhyaya v. Bhupendro Narain Dutt*(4), *Norendro Nath Roy Chowdhry v. Srinath Sandel*(5), and *Bidhu Mukhi Dabi v. Bhugwan Chunder Roy Chowdhry*(6). The case of *Joypal Dhobi v. Palukdhari*(7) does not carry the law further than *Gokhul Sahu v. Jodu Nundun Roy*(8).

Cur. adr. vult.

The judgment of the Court was delivered by

SENVANS J. This appeal was originally heard by a Division Bench of this Court consisting of GHOSH and BRETT, JJ. In consequence of a difference of opinion between those two learned Judges it has been referred for rehearing under the provisions of section 575 of the Code of Civil Procedure to this Bench, which has been specially constituted for the purpose.

The second plaintiff and the defendant, Jamini Kanta Lahiri Chowdhuri, who is called in the plaint the *pro forma* defendant, are the proprietors of *mausa* Sahildeo in the district of Mymensingh. The first plaintiff has obtained from the latter a *putni* of his share in the village, amounting to one-half. Before the grant of the *putni* the *pro forma* defendant joined with the second plaintiff's predecessors in title in making an application under section 103 of the Bengal Tenancy Act, 1885 (before the amendment of the Act). The application itself is not before us; but

(1) (1901) I. L. R. 29 Calc. 252.

(2) (1899) I. L. R. 27 Calc. 167.

(3) (1892) I. L. R. 20 Calc. 249.

(4) (1891) I. L. R. 19 Calc. 152.

(5) (1891) I. L. R. 19 Calc. 641.

(6) (1891) I. L. R. 19 Calc. 643.

(7) (1898) 2 C. W. N. 491.

(8) (1890) I. L. R. 17 Calc. 721.

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we find it described in the judgments of the Special Judge and of this Court, respectively, in the proceedings which arose out of it as an application "for the measurement and preparation of a record of rights" in respect of the lands situated in the *mausa*. In paragraph 6 of the plaint in the present suit it is stated that the applicants, "having been unable to measure the lands of the aforesaid *mausa* Sahildeo, to effect a settlement with the tenants, jointly applied to the Collector of Mymensingh for the preparation of a record of rights in respect of the said *mausa* under Chapter X of the Bengal Tenancy Act, VIII of 1885," and it is further stated that "thereupon the lands of the said *mausa* were measured and *chittas*, *khatians*, and other papers were prepared in connection therewith."

It appears that certain land, in area about 592 bighas, which had been measured by the *amin* as being liable to the payment of ordinary rent, was claimed by the original principal defendants in the present suit as being their *mukarari chakk* holding at a fixed rent, while the proprietors of the *mausa* maintained that they were not tenants at all, but were trespassers. The Settlement Officer in charge of the proceedings heard and decided the dispute under the provisions of section 106 of the Act, the decision to which he came being that the claimants did in fact hold about 156 bighas out of the area in question on the title which they set up. Both parties appealed to the Special Judge under the provisions of sub-section (2) of section 108 of the Act, with the result that that officer's decision was in favour of the claimants to the full extent of their claim. The proprietors then preferred a second appeal to this Court under sub-section (3) of section 108 of the Act. That appeal was dismissed on the ground that the judgment of the Special Judge disclosed no error of law.

The present suit was then brought with alternative prayers (a) for ejectment and mesne profits with a declaration of the right of the plaintiffs to the land in dispute, and a further declaration that the principal defendants have no *mukarari chakk* right or tenancy right in the land, or (b) for a declaration that the plaintiffs are entitled to get a fair and reasonable rent on account of the same. The plaint sets forth the case of the

plaintiffs upon the merits of the dispute and in the twelfth paragraph the decision of the Settlement Officer is referred to as follows :—

“Defendants Nos. 1 and 2 being wrongfully in possession of the lands and there being no relationship of landlord and tenant between the plaintiffs and the said defendants, the Settlement Officer had no jurisdiction to decide any question between the parties in respect of the said lands. And the decision in the record of rights proceeding can be no bar to a title suit under the ordinary law of the land.”

After a protracted trial the suit was dismissed without any decision on the merits, upon the ground that the decision in the case under Chapter X of the Bengal Tenancy Act operated as *res judicata* under the provisions of section 13 of the Code of Civil Procedure.

From that decree of dismissal the plaintiffs have preferred the present appeal. The appeal has been argued before this Bench, as before that which heard it on the former occasion, mainly on grounds which have not hitherto been put forward at any stage of the litigation, if we except the contention in the 12th paragraph of the plaint, which we have noticed above. It has been contended for the appellants that in the absence of an order of the Government under section 101 of the Bengal Tenancy Act, a Revenue officer would have no authority to make any survey, or prepare any record of rights upon an application made under section 103 of the Act, inasmuch as the latter section contains no provision empowering him to do these things, or empowering the Local Government to authorise him, by rule or otherwise, to do them. It is argued that under section 103 the powers of a Revenue officer are limited to ascertaining and recording the particulars specified in the last foregoing section. Section 103, it is contended, is only a re-enactment in a different form of the provisions of sections 38 and 39 of Bengal Act VIII of 1869, which provided that in certain cases, at the instance of the proprietor of an estate or tenure, the Collector might, under an order of a Court, measure the lands comprised in such estate or tenure, and ascertain and record the names of the persons in occupation of the same, or on the special application of the proprietor ascertain,

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determine and record the tenures and under-tenures, the rates of rent payable in respect of such lands and the persons by whom respectively the rents were payable. It is urged that section 103 is entirely unconnected with the following sections in the same Chapter, so that upon an application made under it there can be no settlement of rent under section 104, the record made is not "a record made under this Chapter" within the meaning of section 105, and the Revenue officer making it has no power to hear and decide disputes under section 106, nor would section 107, which provides that his decision in proceedings for the settlement of rents and in proceedings under section 106 shall have the force of a decree, apply to anything which he might do under section 103. It is contended that in any case, as the tenancy was not admitted and the question was as to its existence, the Settlement Officer was not competent to decide the dispute at all. It is urged that any rules made by the Local Government under the provisions of section 189 of the Act, which purport to empower and direct an officer acting upon an application made under section 103 to proceed in the same manner as if he were acting under an order made under section 101, are *ultra vires*.

No authority has been cited to us to show that this Court has ever recognised such a distinction, as it has now been sought to establish between proceedings taken under section 103 and those taken under section 101 of the Act. On the other hand, the Court has acted on the basis of the essential similarity of the proceedings, as in the case of *Achha Mian Chowdhry v. Durga Churn Law*(1). In that case action had been taken under section 103 of the Act; rents had been settled under section 104; a decision had been arrived at by the Revenue officer and an appeal preferred to the Special Judge, who, after deciding it, reviewed his own order. It was held, with reference to the rules framed by the Local Government under section 189 of the Act, that proceedings under section 103 were suits between landlord and tenant within the meaning of section 143, so that the Special Judge was competent to review his order.

As regards the contention that section 103 is intended merely to supply the place of sections 38 and 39 of Bengal Act VIII of

(1) (1897) I. L. R. 25 Cal. 146.

1869, we may remark, in the first place, that it is not altogether easy to reconcile it with the other contention which has been strongly pressed upon us in the course of the same argument that an officer proceeding under section 103 has no power to make any survey or measurement at all. It is, moreover, useless, for the purpose of determining the relation between section 103 and section 101 of the Bengal Tenancy Act, to go back to Bengal Act VIII of 1869, because there was nothing in that Act at all corresponding to the provisions of the latter section. We must be guided entirely by the provisions of the Bengal Tenancy Act itself.

Both section 101 and section 103 occur in Chapter X, which is headed "Record of Rights and Settlement of Rents." The Chapter ends with section 115. Section 103 provides that on the application of a proprietor or tenure-holder, a Revenue officer may "ascertain and record," with respect to a particular estate or tenure or any part thereof, the particulars specified in section 102, that is, exactly the same particulars which may be required to be recorded under an order made under the provisions of section 101 "in respect of the lands in a local area."

The suggestion that a proceeding under section 103 presupposes an order under section 101 seems to us to have no force. In the first place, when once an order had been passed under section 101 for the making of a survey and the preparation of a record of rights in a local area, a further application on the part of a proprietor or a tenure-holder in respect of lands within that area would be obviously unnecessary and unmeaning. A comparison of the two sections seems to show that they are intended to meet altogether different circumstances. Section 101 applies where the survey and record of rights are required to be made over an area which may include many different estates, and (except in the case contemplated by clause (a) of sub-section (2), "where the landlord or a large proportion of the landlords or of the tenants applies") where they are required for reasons of State. Section 103 applies where the proprietor of a particular estate or the holder of a particular tenure requires for his own purposes an authoritative official ascertainment and record of the same particulars in respect of that estate or tenure or any part thereof as would be recorded

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under an order made under section 101. In order to be recorded, the particulars must first be ascertained; and as the particulars to be recorded are the same, whether the record be made in consequence of an order of the Local Government under section 101 or upon an application by a proprietor or tenureholder under section 103, it seems difficult to see *a priori* why there should be any difference in the modes of ascertainment to be adopted in the two cases. Under rule 47, Chapter VI, of the rules framed by the Local Government under the provisions of section 189 of the Act, a Revenue officer in conducting operations under section 103 shall proceed in accordance with the rules for the guidance of officers acting under orders made under section 101. We are unable to accept the contention that because section 103 contains no express provisions for survey or measurement, a rule framed by the Local Government, directing or empowering a Revenue officer to make a survey or measurement, must necessarily be *ultra vires*. The section empowers the Revenue officer to "*ascertain*, subject to and in accordance with rules made in this behalf by the Local Government," the particulars to be recorded, and we think it must be taken that the Local Government is empowered to authorise the Revenue officer to do any act, not contrary to law, which may be necessary to enable him to ascertain those particulars. Among the particulars in question are those specified in clause (c) of section 102, namely, "the situation, quantity and boundaries of the land held by" each tenant. These are particulars which could not be accurately ascertained without survey and measurement, and we may point out that it is clear on the allegations of fact set forth in paragraphs 5 and 6 of the plaint, that in the present case the proprietors could not possibly have attained the object which they had in view unless such operations had been carried out in the first instance. Moreover, section 189 of the Act, under which the rules for the guidance of Revenue officers were framed by the Local Government, expressly provides that by such rules the Local Government may confer upon any such officer among other powers that "to enter upon any land and to survey, demarcate and make a map of the same, and any power exercisable by any officer under the Bengal Survey Act, 1875."

With regard to the application of section 104 to proceedings taken under section 103, we think that as the former section by its terms applies to "any proceedings under this Chapter," that is, Chapter X of the Act, it must be applicable to proceedings under section 103 equally with proceedings under section 101. Similarly, section 105 is by its terms applicable to a "record made under this Chapter," and a record of the particulars specified in section 102 seems to us to come within that description none the less when it is prepared upon an application made under section 103 than when it is the result of an order passed under section 101. It follows that sections 106, 107 and 108 are also applicable.

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We may point to the analogous provisions in Chapter XI for the recording of proprietors' private lands as lending some support to the view which we have expressed. Section 117 empowers the Local Government to direct a Revenue officer to "make a survey and record of all the lands in a specified area which are a proprietor's private lands," while section 118 provides that in the case of any land alleged to be a proprietor's private land, on the application of the proprietor or of any tenant of the land "a Revenue officer may, subject to and in accordance with rules made in this behalf by the Local Government, ascertain and record whether the land is or is not a proprietor's private land." The differences of expression between these two sections correspond closely to those between sections 101 and 103; yet section 119 renders it clear that the same procedure is to be adopted, whether action be taken under section 117 or section 118, for it provides that in either case the provisions of sections 105 to 109, both inclusive, shall apply.

We next come to consider the contention that as the fact of the tenancy was not admitted by the landlords, and there was a question as to its existence, the Revenue officer was not competent to decide that question.

We think that it was absolutely necessary for the Revenue officer to deal with the question, in order to enable him to make the necessary entries under clauses (a) and (b) of section 102 of the Act, that is, the entries relating to the name and status of the tenant. There is no provision in the Act requiring that the

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Revenue officer shall stay his hand in the event of such a dispute being raised as that in question. He is, on the contrary, required by section 103 to ascertain for himself the particulars to be recorded under section 102, and we think that section 106 contemplates that he shall be competent to decide any dispute which may arise as to existing facts affecting the correctness of any entry which he proposes to make, or has made, under section 102. It may be, as in the present case, that the decision of the dispute may involve questions of law such as can be dealt with only by the Civil Courts; but that consideration does not seem to us to have any weight in the face of the fact that a special jurisdiction has been conferred upon the Revenue officer to deal with such disputes.

It remains to consider what is the legal effect of the decision of the Revenue officer. Section 107 of the Act provides that it "shall have the force of a decree," and it has therefore been argued for the respondent that it must operate as *res judicata*,—a view which also commended itself to GHOSH J. in dealing with the present case. The cases relied on in support of this argument are those of *Gokhul Sahu v. Jodu Nundun Roy*(1), *Joypal Dhobi v. Palukdhari*(2), and *Ram Autar Singh v. Sanoman Singh*(3). The second of these cases was decided on the authority of the first, and the third case followed the second.

In the first case there was no dispute in reality as to the relation of landlord and tenant between the parties; but the one alleged the land in question in the case to be rent-paying, while the other claimed that it was rent-free. The result of the record of rights proceedings was to establish its rent-free character. The landlord sued for a declaration that it was liable to pay rent, and it was held by this Court "with considerable hesitation" that the matter was *res judicata*.

In the second case the dispute was as to whether certain land was the landlord's *zerai* or the tenant's occupancy holding. The Revenue officer took the latter view, and it was held by this Court, on the landlord's suing for a declaration of his *zerai* right with possession, that he was barred by the Revenue officer's decision.

(1) (1890) I. L. R. 17 Calc. 721,

(2) (1898) 2 C. W. N. 491.

(3) (1899) I. L. R. 27 Calc. 167.

It appears from the judgment to have been understood by the learned Judges who decided that case, that there was no dispute as to the relation of landlord and tenant, and their decision was based on the previous case which we have just noticed.

In the third case the landlord sued for rent at the rate found and recorded by the Revenue officer under section 107 of the Bengal Tenancy Act upon a dispute between the parties. The tenants again disputed the rate of rent in the rent suit, and it was held by this Court with reference to the last case that the decision of the Revenue officer operated as *res judicata*.

For the appellants it has been sought to distinguish these cases on the ground that there was not in them, as there is in the present case, a total denial of the relation of landlord and tenant by one of the parties, and we have been asked to adopt the principle laid down in the case of *Peary Mohun Mukerjee v. Ali Sheikh*(1), in which it was held that in a proceeding under section 158 of the Bengal Tenancy Act an issue regarding a dispute as to the existence of the relation of landlord and tenant between the parties could only be decided collaterally and did not arise between the parties in such a manner as to make the decision upon it *res judicata* between them in a subsequent regular suit, although it would be necessary to inquire into and decide such a dispute in order to determine the name and description of the tenant. The reasons stated for this decision may be briefly summed up as follows :—

- (i) Section 158 does not empower the Court to decide disputes as to the right to possession of the land; but it is intended merely to provide a summary procedure for settling disputes between landlord and tenant in regard to the particulars referred to in clauses (a), (c), and (d) of the section.
- (ii) No decree for possession could be given in a proceeding under section 158, so that one person might be declared entitled to possession, while another might ostensibly hold actual and direct possession.
- (iii) The section does not empower the Court to bring before it all persons claiming to have rights on the land.

(1) (1892) I. L. R. 20 Calc. 249.

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It seems to us difficult to say that the first two of these reasons are not as applicable to a record under section 102 as to proceedings under section 158. With regard to the particulars which may be determined by a Court under section 158 on the application of either the landlord or the tenant, clause (a) of the section answers to clause (c) of section 102, clause (b) to clause (a), clause (c) to clause (b), and clause (d) to clause (e). Moreover, sub-section (3) of section 158 provides that an order made on an application under the section shall have the effect of, and be subject to the like appeal as, a decree. There is, therefore, we think, sufficient analogy between a proceeding under section 158 and a proceeding under section 103 to make the case of *Peary Mohun Mukerjee v. Ali Shukh*(1) applicable to the case before us, which appears to be distinguishable from the cases cited for the respondents on the ground suggested by the learned vakil for the appellants. In this view we do not feel pressed by the authority of those cases to hold that the rule of *res judicata* applies in the present case.

There remains another consideration in connection with the question, whether the present suit is barred as *res judicata*. In order to constitute *res judicata* under section 13 of the Code of Civil Procedure, the issue with respect to which the rule is to operate must have been heard and finally decided by a Court of jurisdiction competent to try the subsequent suit in which it is sought to raise the same issue. The present suit is a suit in ejectment and for mesne profits, as well as for declaration of title, and the Revenue officer would not have been competent to try it. In their judgment in the second appeal preferred against the decision of the Special Judge in the proceedings under the Bengal Tenancy Act, the learned Judges of this Court who disposed of the case observed: "We think that the question as to whether the defendants have a right to eject the plaintiffs does not properly arise in these proceedings. This is not an ejectment suit, and no issue on this point was raised before the Settlement Officer." No such issue could, in fact, be raised before a Revenue officer acting under Chapter X of the Bengal Tenancy Act, for, unless he is called upon to make a settlement of rent,

(1) (1892) I. L. R. 20 Cal. 249.

he can only ascertain and record the existing state of things. We do not think that, if this be so, it can be said that the decision of the Revenue officer would operate as *res judicata* to bar the present suit under the provisions of section 13 of the Code of Civil Procedure. There is no provision in the Bengal Tenancy Act which has the effect of making such a decision final for all purposes irrespectively of the provisions of section 13 of the Civil Procedure Code. Section 107 does indeed provide that a decision in a proceeding under section 106 "shall have the force of a decree," but it does not necessarily follow that it shall in all cases operate as *res judicata*, for an ordinary decree of a Civil Court has not that effect, except in certain conditions, which are set forth in section 13 of the Code of Civil Procedure.

The conclusion at which we arrive on the whole is that the present suit was not barred. We therefore decree the appeal and remand the case to the Court of first instance for decision on the merits. The costs of this appeal will follow the result.

Appeal decreed: case remanded.

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CRIMINAL REVISION.

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August 29.

Security for good behaviour—Offences involving a breach of the peace, meaning of—Immoral and indecent acts—Criminal Procedure Code (Act V of 1898) ss. 106 and 110, cl. (e).

The words "offences involving a breach of the peace" in s. 110, cl. (e), of the Criminal Procedure Code mean offences in which a breach of the peace is an ingredient and not offences provoking or likely to lead to a breach of the peace.

Where a person, who was found by the Magistrate to be addicted to acts of immorality in attempting to seduce women and behaving indecently and immodestly towards them, was bound over to give security for good behaviour under s. 110, cl. (e), of the Code—*Held*, that the order for security should be set aside, as the offences were not such as involved a breach of the peace within the meaning of that clause.

RULE granted to the petitioner, Arun Samanta.

This was a rule calling upon the District Magistrate to show cause why the order requiring the petitioner to furnish security for good behaviour under s. 110, cl. (e), of the Code of Criminal Procedure should not be set aside on the ground that the District Magistrate should have held that the case did not fall within cl. (e), as there was no offence involving a breach of the peace found.

On the 26th May, 1902, the petitioner was bound over by the Deputy Magistrate of Midnapore to give security for good behaviour for one year under s. 110, cl. (f), of the Criminal Procedure Code by reason of his being so desperate and dangerous as to render his being at large without security hazardous to the community. On appeal the District Magistrate found that that character was not proved, but he maintained the order, as he found on the evidence that the petitioner habitually committed, or attempted to commit, offences involving a breach of the peace

* Criminal Revision No. 666 of 1902.

within the terms of s. 110 cl. (e) of the Code, inasmuch as he was addicted to acts of immorality in attempting to seduce married women and behaving indecently and immodestly towards them.

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Babu Dwarkanath Chakravarti (Babu Joy Gopal Ghosha with him) for the petitioner. The Magistrate has bound the petitioner over to give security for good behaviour under cl. (e) of s. 110 of the Criminal Procedure Code on the ground that he habitually commits, or attempts to commit, offences involving a breach of the peace. The offences alleged to have been committed are attempts to seduce married women and behaving indecently towards them. Such behaviour no doubt is greatly to be condemned, and should be put a stop to under the Penal Code. But these offences cannot be said to involve a breach of the peace as contemplated by cl. (e). The offences mentioned in that clause are offences in which a breach of the peace is an ingredient. The same construction should be put on the words in that clause as is put by the reported cases on the same words in s. 106 which is in the same chapter. The order to give security under the circumstances is illegal and should be set aside.

The Deputy Legal Remembrancer (Mr. Douglas White) for the Crown. The construction put upon the words "offences involving a breach of the peace" by the other side is too narrow. No doubt they do mean offences in which a breach of the peace is an ingredient, but, I submit, they should also be taken to include offences which provoke or are likely to lead to a breach of the peace. It is very necessary that malpractices of this kind should be speedily dealt with, and the quickest way to do so is to bind the person over under s. 110.

PRINSEP AND MITRA JJ. In this case the petitioner was bound over to give security for good behaviour under section 110 clause (f) of the Code of Criminal Procedure by reason of his being "so desperate and dangerous as to render his being at large without security hazardous to the community." On appeal the District Magistrate found that that character was not proved, but he nevertheless maintained the order, inasmuch as he

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found on the evidence that the petitioner "habitually committed, or attempted to commit, offences involving a breach of the peace" within the terms of section 110 clause (e), which also formed the subject of the enquiry in the Court of the first Magistrate. The offences to which the petitioner is said to be addicted may be described as acts of immorality in attempting to seduce married women and behaving indecently and immodestly towards them. These, however, though offences under the law, are not offences "involving a breach of the peace." We have been asked to understand the expression "offences involving a breach of the peace" as offences provoking or likely to lead to a breach of the peace. We are, however, met by section 106 of the Code of Criminal Procedure, which forms a part of the same Chapter as section 110 in which the same words are used, and certainly in section 106 those words would not bear the interpretation which we are now asked to put on them. We must therefore hold that offences involving a breach of the peace mean offences in which a breach of the peace is an ingredient. No doubt in the interests of the community it may be desirable to control the habits and actions of a man who is said to behave in the manner in which the petitioner is described to have behaved, but we cannot find that he has brought himself within the terms of the law so as to require that he should give security for good behaviour. The rule is, therefore, made absolute and the order for security set aside.

Rule made absolute.

D. S.

APPEAL FROM ORIGINAL CIVIL.

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January 23,
24, 27, 29,
30, 31.
February 3,
4, 6, 7, 11,
12, 13.
November 18,
19, 20, 24.
December 22.

Original Jurisdiction—High Court—Fraud—Suit for land—Decree—Mofussil Court—Letters Patent, 1865, cl. 12—Civil Procedure Code (Act XIV of 1882) ss. 11, 17—Property—Executors—Trust—Limitation Act (XV of 1877) s. 10. Will, Construction of.

The High Court has original jurisdiction under cl. 12 of the Letters Patent and ss. 11 and 17 of the Civil Procedure Code to entertain a suit to set aside a decree of a mofussil Court on the ground of fraud.

Bandon v. Becker(1), *Queen v. Saddlers' Company*(2), *Rajib Panda v. Lakhan Sundh Mahapatra*(3), *Prasanna Mayi Dasi v. Kadambini Dasi*(4), *Mason v. Payne*(5) referred to.

Where property was by will vested in executors in trust to pay legacies, allowances, debts, and the residue of the income of one-third of the testator's estate to his widow for life, and a suit was brought by her for the administration of her share in the estate, and for a declaration that certain leases granted by the executors to themselves could not stand as against her, the beneficiary:

Held, that such a suit is not a suit for land, and that s. 10 of the Limitation Act applied.

Saroda Pershad Chattopadhyaya v. Brojo Nath Bhattacharjee(6), distinguished. *Harro Coomaras Dooses v. Tarini Churn Bysack*(7) referred to.

The testator in his will made use of the following expression with reference to the expenses for the *Pujals*, etc.—“You (i.e., the executors) are to pay my share of the expenses whatever that may be.” *Held*, that the testator did not intend thereby to give the executors (they being the parties to decide what those expenses should be) such an absolute discretion in the matter as might deprive the beneficiary under the will of any beneficial interest in the estate. *Mullick v. Mullick*(8) referred to.

APPEAL from the judgment of Stanley J. by the defendant Nundo Lal Bose.

* Appeal from Original Civil No. 28 of 1900 in suit No. 311 of 1898.

Appellate Bench: Sir Francis W. Maclean, Kt., K.C.L.S., Chief Justice, Mr. Justice Banerjee and Mr. Justice Hill.

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| (1) (1835) 3 Cl. and Fin. 479. | (5) (1873) L. R. 8 Ch. App. 331. |
| (2) (1863) 10 H. L. C. 404. | (6) (1880) L. L. R. 5 Calc. 910. |
| (3) (1839) I. L. R. 27 Calc. 11, 16. | (7) (1832) I. L. R. 3 Calc. 766. |
| (4) (1868) 3 B. L. R. (O. C.) 85. | (8) (1829) 1 Knapp 245. |

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One Rai Mohendra Nath Bose died on 16th August 1874 without issue, leaving him surviving his mother Thakurani Dassi, his sister Kadumbini Dassi, his two brothers Nundo Lal Bose and Pashupati Nath Bose and his widow, the plaintiff, Nistarini Dassi, who was at that time 13 years of age. By his will dated 9th August 1874, Mohendra Nath Bose bequeathed one-third of his estate to his brother Nundo Lal Bose, another third to his brother Pashupati Nath Bose, and after bequeathing various legacies and annuities, including an annuity of Rs. 100 a month to his widow Nistarini Dassi, directed that the surplus income of the remaining one-third should be applied in the purchase of Government securities and the interest of such securities be paid to his widow Nistarini Dassi for her life, and after her death such securities were to go to the person or persons, who might then be the heir or heirs of the testator. Mohendra Nath Bose appointed his brothers, Nundo Lal Bose and Pashupati Nath Bose, and one Kali Churn Bhutta-charjee, executors of his will, but the last-named executor did not take out probate of the will, nor did he take any part in the administration of the testator's estate. On the 4th September 1874, Nundo Lal Bose and Pashupati Nath Bose took out probate of the will. The widow Nistarini Dassi continued to reside in the family dwelling-house, and Nundo Lal Bose as *karta* of the joint family, managed the whole of the property.

By a deed of trust dated 24th May 1877, Nundo Lal Bose and Pashupati Nath Bose purported to convey all the property belonging to the joint family to Thakurani Dassi and Kadumbini as trustees to hold it subject to certain trusts declared in the trust deed.

In 1888 a reference was made to certain arbitrators who, by an award dated 16th July 1889, purported to cancel the deed of the 24th of May 1877, to partition the family property, and to provide for certain family religious festivals. The award was signed by Nundo Lal Bose, Pashupati Nath Bose, Thakurani Dassi, Kadumbini Dassi, and the plaintiff Nistarini Dassi.

On the 27th July 1889 Nundo Lal Bose filed a petition in the Court of the Twenty-four Pergunnahs at Alipore for the confirmation of the award, and on the 27th August 1889 a petition was filed in the same Court bearing the signatures of

Pashupati Nath Bose, Thakurani Dassi, Kadumbini Dassi, and the plaintiff Nistarini Dassi, in which they said they had no objection to the award being filed, and on the 29th August 1889 a consent decree was made in terms of the award.

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In accordance with the award Nundo Lal Bose and Pashupati Nath Bose as executors of the will of Mohendra Nath Bose purported to grant with the privity and concurrence of the plaintiff Nistarini Dassi two mokurrari leases—one to Nundo Lal Bose and the other to Pashupati Nath Bose—of certain immovable property allotted by the arbitrators to the residuary estate of Mohendra Nath Bose. Both leases were dated 1st March 1891, and both bore the signature of the plaintiff Nistarini Dassi.

Thakurani Dassi died in the year 1892.

In 1898 the plaintiff Nistarini Dassi as widow and heiress of Mohendra Nath Bose instituted this suit against Nundo Lal Bose and Pashupati Nath Bose in their private capacities and as executors of the will of her husband, and Kadumbini Dassi, the surviving trustee of the deed of trust of 24th May 1877.

The plaintiff in her plaint alleged that the defendant Nundo Lal Bose had obtained her signature to various documents in connection with the reference, the award, the decree made on the award, and the leases without her knowing the nature and meaning of such documents, and that she had never had any independent legal advice with respect to such documents.

She charged the defendants with various breaches of trust in their conduct as executors, and asked for the construction of her husband's will, for the administration of his estate, and for accounts from the defendants. She further asked the Court to declare the deed of trust, the award, the decree made on the award, and the leases, to be fraudulent and void as against her, and not in any way binding upon her, and that, so far as the defendants purported to deal in any way with the residue of her husband's estate, she asked the Court to set aside and cancel it.

Leave had been obtained at the filing of the plaint to institute the suit under cl. 12 of the Charter, on the ground that the plaintiff's cause of action arose partly within and partly without the local limits of the Ordinary Original Civil Jurisdiction of the Court.

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The defendants Nundo Lal Bose and Pashupati Nath Bose each filed written statements, but the defendant Kadumbini Dassi did not enter appearance.

The defendant Nundo Lal Bose in his written statement admitted that the plaintiff had had no independent legal advice, but raised several preliminary objections to the suit. He pleaded (1) that the High Court as a Court of Original Jurisdiction had no jurisdiction to entertain the suit, in so far as it sought to set aside the decree of the Alipore Court; (2) that as the immoveable property covered by the leases was wholly outside the local limits of the Ordinary Original Civil Jurisdiction of the High Court, the suit in so far as it sought to set them aside did not lie in that Court, and it had no jurisdiction to entertain it; (3) that the suit was bad for multifariousness, misjoinder of causes of action and parties, and for joinder of claims against the defendants as executors of the will of Mohendra Nath Bose and against them personally, in that it wrongly joined claims for the construction of the will and the administration of the estate of Mohendra Nath Bose with claims to avoid the trust deed, award, decree and leases; (4) that all the *cestuis que trustent* under the trust deed ought to be parties to the suit; (5) that on account of the award the claim for the construction of the will of Mohendra Nath Bose as regards any rights of the plaintiffs thereunder was *res judicata*; (6) that the suit included causes of action in respect to moveable property and to immoveable property; and as no leave had been obtained under s. 44, rule A of the Civil Procedure Code, the suit was not maintainable; (7) and that as part of the immoveable property, the subject-matter of the suit, was outside the Ordinary Original Civil Jurisdiction of the High Court and no leave had been obtained in respect thereof under cl. 12 of the Charter, the suit was not maintainable in that Court.

Mr. Justice Stanley on the 14th June 1899 delivered judgment on the preliminary objections raised by the defendant Nundo Lal Bose(1).

At the suggestion of Mr. Justice Stanley, certain terms of alleged compromise were put in, and a decree was made on the 29th June 1889 in terms of the alleged compromise. Before,

(1) (1899) I. L. R. 26 Calc. 906.

however, the decree was drawn up, the defendant Nundo Lal Bose applied on notice to the parties to have the alleged compromise set aside and the suit retried, on the grounds that, though there were negotiations for a compromise, he had never authorised his Counsel to agree to the compromise alleged, and that his Counsel had no such authority. Mr. Justice Stanley refused the application, and the defendant Nundo Lal Bose appealed.

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On the 10th January 1900, His Lordship the Chief Justice, Mr. Justice Macpherson and Mr. Justice Hill, delivered judgment in favour of the appellant and directed the suit to be retried(1).

The suit came on before Mr. Justice Stanley, who delivered judgment on the 11th July 1900 in favour of the plaintiff Nistarini Dassi(2), and held the award dated 16th July 1889 and the decree dated the 29th August 1889 to be fraudulent and void as against the plaintiff and not binding on her, and directed the two leases dated 1st March 1891 to be set aside, and the usual enquiry and accounts in an administration suit to be carried out.

From this decision the defendant, Nundo Lal Bose, appealed.

Mr. Pugh (*Mr. Chakravarti* with him) for the appellant.

In order to found jurisdiction as regards land, the land must be within the jurisdiction of the Court. The policy of the law now is, apart from the fusion of law and equity, that what one Court does another Court of concurrent jurisdiction must accept, until the decree of the first Court has been set aside by that Court. See *Malkarjun v. Narhari*(3).

The lower Court seems to think that, when it has no jurisdiction to set aside a sale or a decree, it can still declare it a nullity and give relief. *Aushotosh Chandra v. Tara Prasanna Roy*(4) referred to. The case of *Shedden v. Patrick*(5) is no authority for the proposition laid down by the lower Court. In the case of *Flower v. Lloyd*(6) there is a direct and distinct authority in my favour.

(1) (1900) I. L. R. 27 Calc. 435. (4) (1884) I. L. R. 10 Calc. 612.

(2) Suit No. 311 of 1888 (unreported). (5) (1855) 1 Macq. H. L. Cas. (Scotch) 607.

(3) (1900) I. L. R. 25 Bom. 337. (6) (1877) L. R. 6 Ch. D. 297.

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One Court cannot set aside a decree of another Court of concurrent jurisdiction at the suit of a party, who is a party to the first decree, and the case of *Rajib Panda v. Lakhon Sendh Mahapatra*(1) shows that the decree would remain in force, until it was dealt with.

Section 44 of the Evidence Act does not give jurisdiction. It does not abrogate any rule of law as regards procedure. The words "a suit or other proceeding" must read as a suit or proceeding properly framed and brought in the proper Court; the Lower Court cannot read the words as meaning any suit or proceeding. A decree under this section cannot be set aside by a Court, which otherwise has no jurisdiction to set aside the decree.

In the English cases the Court of Chancery undoubtedly had jurisdiction, but the rule of law says that a Court, although it may have jurisdiction over the facts of the case, cannot set aside the decree of a Court of concurrent jurisdiction. This suit as regards the Gaya leases is, I submit, a suit for land, and in a suit for land the land must be wholly within the jurisdiction of the Court. See cl. 12 of the Charter.

Though the decree was a consent decree, you must show fraud before you can set it aside. *Ghulam Khan v. Muhammad Hassan*(2) referred to.

A very clear case of fraud would have to be made out to set aside the award, which has been acted upon for eight or nine years. See s. 521 of the Civil Procedure Code and s. 10 of the Limitation Act. *Saroda Pershad Chattopadhyaya v. Brojo Nath Bhattacharjee*(3) referred to.

There is no case where a decree has been set aside except on the ground of fraud. *Patch v. Ward*(4), *Derry v. Peek*(5), and *Weir v. Bell*(6) referred to.

To show fraud without injury will not do: neither will it do to show injury without fraud.

Field on Evidence (5th edition), p. 341, and Daniel's Ch. Practice, p. 1428, cited.

(1) (1899) I. L. R. 27 Calc. 11.

(2) (1901) I. L. R. 29 Calc. 167.

(3) (1880) I. L. R. 5 Calc. 910.

(4) (1867) L. R. 3 Ch. App. 203.

(5) (1889) L. R. 14 App. Cas. 337.

(6) (1878) L. R. 3 Exch. D. 233, 243.

Advoc te-General (Mr. J. T. Woodroffe) and Mr. S. Bonnerjee for the respondent Nistarini Dassi.

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The decree has been proved by the adverse party within the meaning of s. 3 of the Evidence Act.

There is no enactment against bringing this suit. See ss. 11, 16 and 17 of the Civil Procedure Code and cl. 12 of the Charter. *Prasannamayi Dasi v. Kadambini Dasi*(1) referred to.

The High Court has jurisdiction to entertain this suit which is a suit for administration. The cause of action is the wrongful administration of the estate.

The plaintiff has to get rid of the effect of the decree, but there is a distinction between setting aside the decree and treating it as of no effect: *Aushootosh Chandra v. Tara Prasanna Roy*(2), *Mewa Lall Thakur v. Bhujhun Jha*(3), *Bibee Soloman v. Abdool Aziz*(4). In the case of *Meadows v. Kingston*(5) there was no suggestion of fraud.

Section 3 of Act VIII of 1859 finds no place in the present Code of Civil Procedure. *Allen v. McPherson*(6), *Flower v. Lloyd*(7), *Bandon v. Bacher*(8) and *Shedden v. Patrick*(9) referred to. See Bigelow on Estoppel, p. 138, and Taylor on Evidence, para. 1713.

The following cases have been decided in this country bearing on this matter :—*Ahmedbhoy Hubibhoy v. Vullebhoy Cassumbhoy* (10), *Mirali Rahimbhoy v. Rehmoobhoy Habibbhoy*(11), *Manchharam v. Kalidas*(12), *Krishnabhupati v. Ramamurti*(13), *Srirangammal v. Sandammal*(14), and *Rajib Panda v. Lakkan Sendh Mahapatra*(15). In the last-mentioned case the matter was discussed very fully. No case has been cited in which it has been held that a Court competent in itself to try and determine a suit is debarred from enquiring into that suit. This case comes under

(1) (1868) 3 B. L. R. (O. C.) 85, 88.

(8) (1835) 3 Cl. and Fin. 479.

(2) (1884) I. L. R. 10 Calc. 612.

(9) (1855) 1 Macq. H. L. Cas.

(3) (1874) 13 B. L. R. App. 11 ;
22 W. R. 213.

(Scotch) 535.

(4) (1879) 4 C. L. R. 366, 370.

(10) (1832) I. L. R. 6 Bom. 708, 715.

(11) (1891) I. L. R. 15 Bom. 594.

(5) (1775) 2 Ambl. 756.

(12) (1894) I. L. R. 19 Bom. 821.

(6) (1841) 5 Beav. 469.

(13) (1892) I. L. R. 16 Mad. 198.

(7) (1877) L. R. 6. Ch. D. 297.

(14) (1899) I. L. R. 23 Mad. 216.

(15) (1899) I. L. R. 27 Calc. 11, 14.

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s. 44 of the Evidence Act, but even if it does not, this Court has ample jurisdiction. Cl. 12 of the Charter covers the question whether the action arose partly in Calcutta, or whether part of the land is out of the jurisdiction.

The application for leave under cl. 12 of the Charter was given generally.

The entire cause of action arose in Calcutta. The case of the *Land Mortgage Bank v. Sudurudeen Ahmea*(1) contains a number of references to various cases, which bear out this contention.

In this suit there is no prayer for possession of land at all.

On the question of limitation, see ss. 10 and 18 and art. 95 of the Limitation Act, and the case of *Rahimbhoy Habibbhoy v. Turner*(2). The case of *Saroda Pershad Chittopadhyaya v. Brojonath Bhuttacharjee*(3), cited by the other side, is distinguishable from this, and besides it has not been received with approval.

This case comes within s. 10 of the Limitation Act, but if it does not, it is saved by s. 18 and art. 95 of the Limitation Act. The breach of trust with regard to the leases was not merely a breach of trust, but a fraudulent breach of trust. *Starling's Limitation Act*, p. 77, referred to.

This suit comes under s. 44, rule (a) of the Civil Procedure Code—*Chidambara Pillai v. Ramasami Pillai*(4) and *Giyana Sambandha Pandara Sannadhi v. Kandasami Tambirun*(5)

The plaintiff is suing for the administration of the estate, and all her relief is founded upon that right and infringement of right by the defendants.

Mr. Garth for the respondent Pashupati Nath Bose, in support of the argument of the Advocate-General.

Mr. A. Chowdhuri for the respondent Kadumbini Dassi.

Mr. Pugh in reply.

MACLEAN C. J. This is a suit by a childless Hindu widow against the executors of her late husband's will and her sister-in-law, one Kadumbini Dassi, in which she seeks to have

(1) (1892) I. L. R. 19 Calc. 358.

(3) (1880) I. L. R. 5 Calc. 910.

(2) (1892) I. L. R. 17 Bom. 341.

(4) (1832) I. L. R. 5 Mad. 161.

(5) (1887) I. L. R. 10 Mad. 375, 506.

certain documents, viz., a deed of trust dated the 24th of May 1877, an award dated the 16th of July 1889, a decree dated the 29th August 1889, and certain leases dated the 1st of March 1891, declared fraudulent and void as against her, to have the will of her husband construed, for an account on the basis of wilful default, for the appointment of a receiver and other consequential relief.

As a bar to that suit, the defendant Nundo Lal Bose, who is the principal defendant, sets up a variety of defences. The defendant Pashupati supports the plaintiff, and the defendant Kadumbini is sued as the surviving trustee of the deed of trust of the 24th of May 1877. It will be convenient, before stating the nature of the various defences, to give a short outline of the case.

The plaintiff was born in the year 1861 and, at the age of 11, in January 1872, was married to the testator, Mohendra Nath Bose. He died on the 16th of August 1874, leaving her a childless widow. By his will dated the 9th of August 1874, he gave out of certain zamindaries and other immovable properties and also moveable properties, all that he possessed, one-third to his brother, the defendant Nundo Lal Bose, another third to his brother Pashupati, and directed that the remaining third should be managed by his executors (I am only stating the will for the present purpose very succinctly) to pay certain legacies and monthly allowances and debts, and subject thereto to pay the income of such share to the plaintiff for life with a gift over, to which I shall have to refer later on. He appointed one Kali Charan Bhattacharjee, the defendants Nundo Lal Bose and Pashupati Nath Bose executors of his will. Kali Charan Bhattacharjee renounced, and probate was granted to Nundo Lal and Pashupati alone on the 4th of September 1874. At that time the plaintiff was about 13 years of age and a *purdanashin* lady. She then lived, and for many years after continued to live, in the family dwelling-house with her brothers-in-law Nundo Lal Bose and Pashupati and her mother-in-law. As the head of the family Nundo Lal would appear, after his brother, the testator's death, to have managed the whole of the property of the joint family. Pashupati as an executor of his dead brother's will took little,

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if any, part in the management, and Nundo Lal managed the property, apparently, without any interference or check from any one.

On the 24th of May 1877 Nundo Lal and Pashupati settled their moveable and immoveable properties by a deed of trust dated the 24th May 1877, and it is of that deed Kadumbini Dassi was appointed a trustee, and as such trustee is a party to the present suit. It is now conceded on all sides that this deed does not affect the one-third of the testator's estate, in which the plaintiff is interested. At this time, in May 1877, Pashupati was a young man of about twenty-one years of age, while Nundo Lal was about thirty or thirty-one. After the execution of this deed Nundo Lal still continued to manage the whole of the joint estate and Pashupati did not interfere.

In the year 1881 Pashupati became dissatisfied with the deed of the 24th of May 1877, and in the result it was agreed between them (Pashupati and Nundo Lal) that with the object of setting this deed aside and of partitioning their property, there should be a friendly reference to arbitration, and with this object a *salisinamah* of the 27th day of July 1888 was prepared, to which the plaintiff's signature was obtained. Except so far as she was made a party to this reference, as interested in the proposed partition, it is difficult to appreciate why she was made a party. The share of her husband's estate, in which she was interested under his will, was not affected by the trust deed of the 24th of May 1877.

The plaintiff on the 27th of Jaistha 1296, corresponding with the 9th of June 1889, was induced to sign a letter in which she expressed concurrence in having the said trust deed set aside; and, on the 12th of June 1889, a further *salisinamah* was executed, to which the plaintiff was a party, by which she purported to empower the arbitrators to cancel the deed of trust, to partition the estate, and to settle the trust accounts. The arbitration proceedings commenced, and on the 16th of July 1889 the arbitrators made their award, by which they purported to cancel the deed of the 24th of May 1877, and decided various other matters in many serious particulars in a manner very adverse to the interests of the plaintiff. On the 27th of July

1889, Nundo Lal filed a petition in the Court of the Twenty-four Pergunnas at Alipore for the confirmation of the award; and on the 27th of August a petition signed by Pashupati, Kadumbini Dassi, Thakurani Dassi, and the plaintiff was filed in the same Court, in which they said they had no objection to the award being filed and enforced. On the same date a *vakalatnamah* was signed by Pashupati, Kadumbini, Thakurani and the plaintiff, purporting to authorize two pleaders, one of whom was the son-in-law of the defendant Nundo Lal, to consent to the application. On the 29th August 1889, a consent decree was made in terms of the award. On the 1st of March 1891, two permanent leases were executed by Nundo Lal and Pashupati as executors of the will of Mohendra Nath Bose—one in favour of Nundo Lal and the other in favour of Pashupati, and the signature of the plaintiff was also obtained to these leases. Thakurani died in 1892.

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This is the history of the case.

The plaintiff says that her supposed assent to the arbitration proceedings, to the award, to the decree and the *vakalatnamah* were each and all obtained by the fraud of Nundo Lal Bose; that she believed that he was protecting her interests, whilst, in fact, he was betraying them; that she was entirely under his influence and did what he told her to do; that she knew nothing about the transactions in question; that the various documents were never explained to her, and that in fact she put her name and gave her assent to any and every document, which Nundo Lal Bose put before her and told her to sign. That is in short her case.

Pashupati in substance supports that case. Kadumbini, who, as I pointed out, is interested only as a trustee under the deed of the 24th of May 1877, put in a defence very late in the day. So far as she has taken any part in the litigation she must be regarded as supporting the case of her brother Nundo Lal.

The defendant Nundo Lal raised a variety of preliminary points, which I will deal with in a moment; and as regards the merits, he relies upon the arbitration proceedings, the award and the decree, and the *mocurrari* leases, and says, in effect, that the plaintiff thoroughly understood what she was doing; that she was not under his influence in any way; that there was no fraud on

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his part; that she was throughout a perfectly voluntary agent in the transaction; that she executed all these documents and was a party to all the proceedings with an accurate knowledge on her part of their meaning, their purport and effect; that everything had been fully explained to her, and that this suit was vexatious and was brought at the instance of Pashupati. But before I deal with the merits, I propose to deal with the various preliminary points, which have been raised, for if Nundo Lal be successful on these, it will be unnecessary to go into the merits.

What are these preliminary objections?

First, he says that this Court has no jurisdiction to set aside the decree; that the only Court that can set it aside is the Court which pronounced it, viz., the Court at Alipore. He says, as regards the setting aside of the *mocurrari* leases of the 1st of March 1891, that there is no jurisdiction in this Court, as the suit, so far as they are concerned, is a suit for the recovery of immoveable property, and so ought to have been brought in the Court within the local limits of whose jurisdiction the property is locally situated, and that it is not locally situated in Calcutta. He also says that the suit is barred by limitation, and that it is multifarious under section 44 of the Code of Civil Procedure. Other questions were raised upon the true construction of the will and some minor questions as to costs, with which I propose to deal later on.

Upon the first point, the Court, in my opinion, had jurisdiction to entertain the suit so far as it seeks to set aside the decree of the Alipore Court. We have been referred to a variety of cases in the Courts of England upon the question whether it is open to one Court to set aside, on the ground of fraud, the decree of another Court. These cases have been dealt with with great minuteness by the learned Judge, who tried the case in the Court below, and especial reliance has been placed before us upon the case of *Allen v. McPherson*(1). For the reasons I am about to give, I do not think it will be necessary to go into these cases. The jurisdiction of the High Courts in India is the creation of the Letters Patent and the Code of Civil Procedure, and it seems to me that before we discuss the English cases, it would be at least desirable to

(1) (1841) 5 Beav. 469.

ascertain what jurisdiction is conferred upon this Court by the Letters Patent and Code, inasmuch as upon this head the constitution of the Courts here may be very different from that of the Courts in England.

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In this connection I would first refer to section 12 of the Letters Patent of 1865. Under that this Court, in the exercise of its Ordinary Original Civil Jurisdiction, which was the jurisdiction invoked in the present case, may receive, try and determine suits of every description in all cases "if the cause of action shall have arisen either wholly or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the Ordinary Original Jurisdiction of the said High Court." I pause there for a moment. Here the leave of the Court was obtained to the institution of this suit, and here the cause of action, so far as it relates to the setting aside of the decree—I am only dealing at present with the objection to that part of the suit—was the fraud of the defendant Nundo Lal Bose, which certainly in part, if not wholly, was committed within the local limits of the Ordinary Original Civil Jurisdiction of the Court. The parties were undoubtedly residing in Calcutta when the alleged fraud was practised by Nundo Lal; and as regards the suggestion that, if any fraud were practised, a portion of it, that is, as regards the obtaining of the decree, was practised at Alipore, which is outside the local limits of the Ordinary Original Jurisdiction of this Court, the answer is that any objection on that head is met by the fact that the leave of the Court to bring the action was previously obtained. And from another point of view as regards section 12, it may be said that the Court derived jurisdiction to deal with the suit. Nundo Lal undoubtedly at the time of the commencement of the suit was dwelling in Calcutta. Kadumbini was also residing there; whilst Pashupati was ordinarily dwelling there though at times apparently he lived in a garden-house outside Calcutta. But at the time of the commencement of the suit, the real defendant in the suit, the one against whom the real relief was sought, *viz.*, Nundo Lal, was dwelling within the local limits of the Court. In my opinion, then, under this section, the Court had jurisdiction to entertain the suit. Apart, however, from this, the plaintiff places reliance upon section

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11 of the Code, which runs as follows :—" The Court shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is barred by any enactment for the time being in force." This High Court in its Ordinary Original Civil Side is a Court within the meaning of that section, and I am not aware of any enactment which bars such Court from taking cognizance of a suit of this description. Reliance is also placed by the plaintiff upon section 17 of the Code, and in my opinion these two sections of the Code give support to the plaintiff's contention. On these grounds I consider that this Court had jurisdiction to entertain the suit to set aside the decree of the Alipore Court on the ground of fraud.

But it has been urged before us for the plaintiff that, if this were not so, the Court had jurisdiction to entertain the suit so far as it was one for the administration of the estate of the testator. As to this, there has not been any serious contention, and, in fact, the present appellant offered no opposition to such a decree, if based on the validity of the award and the subsequent decree of the Alipore Court. This being so, it is urged for the plaintiff that, as the Court had jurisdiction to entertain the suit as an administration suit, if the defendant Nundo Lal relied upon the decree of the Alipore Court as an answer to that suit, it was open to the plaintiff to show that that decree had been obtained by fraud, and reliance was placed upon a variety of cases in the Courts of England, which have been very carefully considered by the Court below, of which *Bandon v. Becher*(1) and *Queen v. Saddlers' Company*(2) may be regarded as prominent illustrations.

As giving effect in the Courts in India to the views laid down in the English cases I have mentioned, reliance is placed upon section 44 of the Indian Evidence Act. To this the appellant replies that we must look at the law as it is in India and not as it is in England; that section 44 codifies the law and is exhaustive upon this particular point; and that, inasmuch as the decree in this case, though relied upon, was not proved by Nundo Lal, section 44 can have no application. It is not very clear upon the evidence whether the Alipore decree was proved by anybody in the suit in the Court below: it

(1) (1835) 3 Cl. and Fin. 79.

(2) (1863) 10 H. L. C. 404.

seems to have been treated as admitted by both parties. It was, however, not the plaintiff, but the defendant Nundo Lal, who relied upon that decree as a bar to the suit. In the view I have previously expressed that the Court had jurisdiction to entertain the suit, it becomes unnecessary to decide this point, though, under the circumstances of this case, I should not be disposed to hold that the plaintiff was unable in this suit to show that the Alipore decree was obtained by fraud. I should be disposed rather to think upon the facts of this case that the Court might regard both the suit and the decree in the Alipore Court as a nullity.

In this connection I desire to say, to prevent future misapprehension, that some observations of mine in the case of *Rajib Panda v. Lakhan Sindh Mahapatra*(1)—I am alluding to what I said at the top of page 16 as to the English practice—may be regarded as going too far, bearing in mind the English cases, to which I have already referred. The observations were unnecessary for the decision of that particular case.

The next objection is that, so far as regards the relief sought in respect of the two leases of the 1st of March 1891, it was a suit for land, and therefore ought to have been brought not in this Court, but in the Court which exercised jurisdiction within the local limits, where the land was situated. The answer to this contention seems to me to be twofold. First, this is not a suit for land. It is a suit for administration, and as incidental to that suit for a declaration that certain leases which the executors of the estate granted to themselves cannot stand as against the plaintiff, the beneficiary. The testator's estate consisted of lands in Calcutta, Gaya, Patna, and other places; secondly, the defect, if defect there were, has been cured by the leave given by the Court, for it has been held in the case of *Prasanwami Dasi v. Kadambini Dasi*(2), which was decided many years ago and which has since been consistently followed, that if the leave of the Court be given in cases in which part of the land is within and part is without the local limits of the High Court, the defect is cured.

And I may here perhaps conveniently deal with the further objection that the suit is not maintainable, having regard to

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(1) (1899) I. L. R. 27 Calc. 11, 16.

(2) (1868) 8 B. L. R. (O.C.) 85.

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section 44 of the Code of Civil Procedure. I think it is sufficient upon this head to say that it is not a suit for the recovery of immoveable property or to obtain a declaration of title to immoveable property, and, even if it were, the leave of the Court was obtained to the bringing of the suit.

The last point is one of limitation. The plaintiff says the case falls within section 10 of the Limitation Act: the defendant Nundo Lal denies this. I think it does. The property was vested in the executors in trust for a specific purpose, that purpose being to pay the legacies, the allowances and the debts, and to pay the residue of the income of the one-third share of the testator's estate to the plaintiff for life. There can be no doubt that the estate did vest in the executors, and it is difficult to say that the purpose for which it was so vested is not specific. Then it is said that the object of this suit is not for the purpose of following in the hands of the executors such property. I think it is: it is clear that the purpose of the suit was to follow the property, which came to the hands of the two executors, to make them account for it, and to hand over to the plaintiff as the result of that account what may be found due to her. The case of *Saroda Pershad Chattopadhyaya v. Brojonath Bhattacharjee*(1) cited for the appellant is for the foregoing reason distinguishable from cases like the present, as has been pointed out by Mr. Justice Wilson in *Hurro Coomaree Dossee v. Tarini Churn Bysack*(2). But, even if this were not so, so far as it is a suit which is based on the fraud of the defendant Nundo Lal, and virtually the whole suit is based upon that ground, the defendant's objection is met by article 95 of the Second Schedule of the Limitation Act, which says that the period of limitation for a suit based on the ground of the present suit is three years from the time, when the fraud was known to the party wronged. Here it has been found by the Court below, a finding in which I agree, that the fraud did not become known to the plaintiff, until a short time before the institution of the suit.

I have now disposed of all the preliminary points. But perhaps before I deal with the merits of the case, it may be convenient, if I deal with two or three points which have been raised upon the

(1) (1880) I. L. R. 5 Calc. 910.

(2) (1882) I. L. R. 8 Calc. 766.

construction of the will. The first question raised was whether the Court below was right in saying that there was an intestacy as to the testator's moveable property. It is practically conceded that the testator had no moveable property other than that which was joint. The Court below held that there was an intestacy, but I doubt if the Court would have arrived at this conclusion if it had known, as is now conceded by all the Counsel in the case, that the translation of the will at page 12 of the paper book is not accurate.

It ought to run in this way. After the words "whatever property there is" ought to come the words "all that one-third is my own share. Two-thirds out of the said my own share, etc." I think that in the description of the property, the testator was referring to all the properties, which were joint, *immoveable and moveable*. I think this is the true interpretation of the words "whatever property there is." Then he says "of all that property," that is to say, whatever property there is, "one-third is my own share." Two-thirds of that share, *i.e.*, of his one-third share of whatever property there is, he gives to his brothers, and the remaining third he deals with in the way I have mentioned. Upon the construction of the will, I think, he disposed, and intended to dispose, of his share in all the joint property, moveable and immoveable, and that he did not die intestate as to the joint moveable property. It has not been suggested that he had any moveable property other than what was joint. In this respect then the decree of the Court below must be varied, and it must be declared that the testator's joint moveable property passed by his will.

The next point is whether the ultimate gift after the death of the plaintiff is bad on the ground that at the death of the testator it would be impossible to predicate who might at the date of the death of the widow be his heirs, and, consequently, that at the date of the testator's death there was no person, who, either in fact or in contemplation of law, was in existence so as to be able to take a gift *inter vivos*. I think the case is governed by the decision of the *Tagore* case (1), and the view of the Court below on this point is well founded.

The next point is that the Court below was wrong in directing an enquiry as to what was a fit and proper sum to be

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(1) (1872) 9 B. L. R. 377.

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allowed as expenses for the Pujahs, etc., the contention being that, inasmuch as the language of the will was, "you are to pay my share of the expenses, whatever that may be," no discretion was vested in the executors, and whatever his share was they were to pay it. It must be borne in mind that the total sum to be paid for these *Debsheba* expenses would in the main be decided by Nundo Lal and Pashupati in conjunction, though the Mitra families apparently had a say in the matter. But, if the defendants' contention be sound, the result would be that the executors could expend every portion of the plaintiff's interest in these expenses and practically leave her nothing. That was pointed out in the case of *Mullick v. Mullick*(1). Although the language of the will in that case is not identical with the language of the will in the present, the principle upon which the Privy Council proceeded in that case appears to me to be applicable to the present. I do not think the testator by the use of the expression "my share of the expenses, whatever that may be," intended to give them—seeing that they were in a great measure the parties, to decide what the expenses should be—such an absolute discretion in the matter as might deprive the plaintiff of any beneficial interest in the estate.

The only other question upon the construction of the will is as to the footing, upon which the account is to be taken. It is said that it ought to be taken as against Nundo Lal as the *karta* of the family, upon the footing of a joint-family account. I do not take this view. I think the plaintiff is entitled to have an account between herself and the defendant upon the footing of a beneficiary against the executors of the will.

I have now disposed of all the preliminary points and the points upon the construction of the will, and I now propose to deal with the merits of the case. But agreeing, as I entirely do, with the reasoning of the Lower Court and the conclusion upon the evidence at which it has arrived, I propose to do so as briefly as I can.

At the death of her husband the plaintiff was a child of thirteen. She was living with her brothers-in-law, Nundo Lal and Pashupati, and her mother-in-law as a member of a joint Hindoo

(1) (1829) 1 Knapp 245.

family. Nundo Lal, as I have said, was the *karta* of the family, and, I have no doubt, was managing its property and affairs. The plaintiff used to appear before Nundo Lal and, notwithstanding what he and his witnesses say, I have no hesitation in concluding that at that time she knew nothing about the will of her husband or what her rights and interests were under that document. She was a *purdanashin* child, and, in the position in which she was then situated, I entertain no doubt that she was entirely under the influence of Nundo Lal, the senior member of the family, and entirely incompetent to understand the documents or the effect of the documents, which she was signing, or to which, it is said, she gave her assent.

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It is unnecessary to refer to the many cases in the Privy Council and in this Court which illustrate the amount of special protection which the Court throws round Hindu ladies situate as was the plaintiff. That was her position at the time of her husband's death. When the trust deed of the 24th of May 1877 was executed, although some attempt was made to show that she was aware of it, because there was some conversation in the family about it, one may point out that at that time she was only sixteen years of age; she had nothing whatever to do with the trust deed, and she was not a party to it; and if she had nothing whatever to do with it, it is not an unreasonable inference that nothing was said to her about it.

I have already pointed out what was the position of the plaintiff at the time she signed the various documents, which are now assailed. I now propose to deal as briefly as I can with each document separately, and the evidence upon the question of whether the plaintiff, when she signed them, had any independent advice, whether she understood the contents of the documents, whether they were ever explained to her, and whether she was acting throughout under the influence and at the instance of Nundo Lal.

In the first place, it is difficult to see why she was made a party to the first *salisinamah* of the 27th July 1888.

She had nothing to do with the quarrels between Nundo Lal and Pashupati; she had nothing to do with the trust deed. Nundo Lal no doubt thought it advisable to make her a party,

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and she was made a party to that *salisinamah* ostensibly with the view of obtaining her assent to the partition which is referred to in that document. I have said generally that I accept the statement of the lady that she did not understand the purport and the effect of these documents; but that, relying upon the integrity of Nundo Lal, and believing that he would adequately protect her interest, she in effect did whatever she was told to do. I am disposed to regard her as a mere puppet in his hands, doing what he suggested and signing all the documents he told her to sign. And upon this question of partition I may point out, and I think the evidence establishes it, that, in order to avoid the expense of a partition deed and from motives of economy, Nundo Lal adopted the device of the so-called arbitration and consequent award, and there can, I think, be very little real doubt but that the terms of the partition between the two brothers had been in substance and in effect agreed upon before the matter was referred to the arbitrators, and the so-called reference to arbitration was merely a device to save the stamp duty on a deed of partition.

Now, although the reference to arbitration is dated the 27th July 1888, according to the letter of the arbitrators of the 8th of June 1889, no meeting was held until the 7th of June 1889, nearly a year afterwards, when it was apparently discovered that the reference to arbitration of the 27th of July 1888 would not work, unless and until the trust deed of the 24th of May 1877 was cancelled. With a view to that cancellation, a somewhat extraordinary letter dated the 8th of June was sent to the plaintiff, in which she was asked to send her views with regard to the proposed cancellation, and a second agreement for arbitration is suggested. To this the plaintiff is induced to reply in the terms of the letter of the 10th of June 1889. What had she to do with the cancellation of the trust deed of 1877? It is conceded that it did not affect the one-third share of her husband's estate, in which she was interested. In this letter she was made to say that "it deserved to be cancelled, as it was made without her presence." Can any one doubt that both this letter and the reply were prompted by Nundo Lal, and that the plaintiff's reply was framed by him and signed by the plaintiff at his instance and under his influence?

Then the second agreement for reference is executed, dated the 12th of June 1889. It is unnecessary to deal in detail with the terms of the second reference. It is sufficient to say that under it, so far as her interest under her husband's will went, the plaintiff would appear to have left herself unreservedly in the hands of the arbitrators. It was eminently a document in respect of which the plaintiff ought to have been separately and independently advised. Upon the evidence I am satisfied she received no such advice and no such explanation as she was entitled to.

Then came the so-called arbitration proceedings. The letter I have referred to from the plaintiff was dated the 10th of June 1889, and the arbitrators made their award on the 16th of July 1889. It is a very elaborate document, and by it, amongst other things, all arrears of rent (and the arrears were substantial in amount) were, in effect, handed over to the two brothers, and the accounts as between the plaintiff and the executors were treated as settled, and there were provisions made for the granting of the *nocurrari* leases, which the plaintiff now seeks to set aside.

It seems to me impossible, having regard to the shortness of the time occupied by the so-called arbitration, that the arbitrators could, as arbitrators, have gone into the complicated matters referred to them; for instance, the partition, the settling of the executorship accounts, which extended over many years, and the terms upon which the *nocurrari* leases were to be granted. I conclude from the evidence that they were not permitted to do so, and I do not think they were ever intended to do so. It is reasonably clear upon the evidence that as regards the partition and as regards the executorship accounts, the whole matter was cut and dried by Nundo Lal before it was laid before the arbitrators, and that the latter were merely puppets in his hands to make just such an award as Nundo Lal himself required. The time occupied in the arbitration could not have permitted of their going, as independent arbitrators, into the elaborate question, to which I have referred. I entirely agree with the criticism of the Court below upon the evidence relating to this part of the case. The story told by the plaintiff and the other ladies of this joint-Hindu family coming and sitting behind a screen and of communications passing from the arbitrators to these ladies and from

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the ladies to the arbitrators, and the plaintiff being asked to consent to the various matters to be dealt with by the proposed award, is, to my mind, one which it is impossible to credit. On the best consideration I can give to the evidence, I do not think that the plaintiff can be said to have been represented at the arbitration, or to have understood what was being done or to have assented to what was being done.

And there is this further element in the case. According to the evidence of some of Nundo Lal's own witnesses, several of the terms of the award were made part of the award with the plaintiff's consent. They say it was a consent award. If so, the arbitrators did not act judicially in the matter, but merely recorded a consent award. I do not believe the evidence of Nundo Lal and his witnesses, who tell us that the plaintiff, having regard to her position in the family, could have understood, or did understand, or did actually give any consent, with any real knowledge of what she was consenting to, to this arbitration or to the award, which the arbitrators purported to make. Of the three arbitrators, one is dead, and Nundo Lal has not ventured to call either of the two arbitrators, who are alive. They could have told us whether the arbitration was a real arbitration or whether it was a mere sham, got up by Nundo Lal in order to meet any possible future claim by the plaintiff in relation to the testator's estate.

In my opinion the whole of these proceedings, commencing with the reference to arbitration, the circumstances of the arbitration itself, and the award, were a mere sham, and no arbitration in the true and proper sense of the term was ever held.

What happened afterwards? Nundo Lal no doubt thought that it would be a wise and prudent thing on his part, in order still further to bind the plaintiff in regard to these matters, to have this award embodied in a decree of some Court, and for that purpose he goes to the Second Court of Alipur—not, it will be observed, to this Court, although all these proceedings took place in Calcutta, and on the 22nd of July 1889 he applies to that Court for the confirmation of the award. But it was necessary to obtain the consent of the plaintiff to this move on his part, and accordingly on the 27th of August 1889 the plaintiff

is made to present a petition consenting to a decree in the terms of the award and to execute a *vakalatnamā*, appointing a gentleman to act as her vakil, who was a near relative of Nundo Lal Bose, for the purpose of giving her consent to such a decree.

This, again, to my mind was eminently a matter in which she ought to have been carefully and separately advised, but she had no independent advice, legal or otherwise.

I do not believe that the plaintiff understood what she was doing when she signed these two documents, and here, again, I entirely disbelieve the evidence of the defendant Nundo Lal and his witnesses, that she understood what she was doing.

There is only one other matter to which I need refer: I allude to the two permanent leases of the 1st of March 1891, to which the signature of the plaintiff was obtained. These are permanent leases of certain portions of the trust estate granted by the two executors to themselves.

It is difficult to see how these leases by the executors to themselves can stand as against the plaintiff. Nundo Lal and Pashupati, upon whom the onus rests, have absolutely failed to substantiate that, when the plaintiff's signature was obtained to these leases, she had any true conception of their nature or effect.

We should be going far, having regard to the evidence, if we were to hold that these leases, executed under these circumstances, could be binding upon the plaintiff.

In my opinion, then, all these documents—the *salisinamahs*, the petition of the plaintiff to the Alipur Court, the *vakalatnamah* signed by her, and the *mocurrari* leases, each and all of them are documents to which, when the plaintiff put her signature, she was in ignorance of their true effect and bearing, and they were not in any adequate sense explained to her. Nor do I think that she understood, or was a party to, the so-called arbitration and award.

Further, I regard this so-called arbitration and award and the documents to which the plaintiff's signature was obtained as part and parcel of a fraudulent scheme on the part of Nundo Lal, with the object of binding the plaintiff and preventing her afterwards from setting up with success that she had not assented to the partition of the estate, to the settlement of the accounts, and to the other matters dealt with by the award. I have abstained

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from discussing in detail the evidence: it was read to us at length and commented upon in great detail during the course of the argument, and it has been dealt with very minutely and with great care by Mr. Justice Stanley in his judgment, and, as I have said before, agreeing so fully both in his reasoning and the conclusion, I think it would now be superfluous for me again to go through the evidence in detail. Upon the merits the conclusion of the Court below was perfectly sound; and even if we could accept as true the evidence of Nundo Lal and his witnesses, as to the knowledge and consent of the plaintiff, which I certainly do not, I do not think that in the case of a *purdanashin* lady, situated as the plaintiff was, such evidence would have been sufficient to discharge the heavy burden which rests upon him in the matter and to satisfy us that the transactions were binding upon her.

I may notice that, even according to his own statement, given in cross-examination, Nundo Lal is a gentleman, who would not shrink from signing a false document, if there were a particular reason for doing so. I have no doubt that the plaintiff did not understand what she had done until, as she says, she was separately advised after consulting her attorney in March 1898.

I conclude this part of the case by quoting the following passage from *Mcron v. Payne*(1):—

“It is true that when a case is based on fraud, the fraud must be proved, and no relief could be given in this suit on any different ground. But the obtaining of property, or of any benefit through the undue and unconscientious abuse of influence by a person, in whom trust and confidence are placed, has always been treated as a fraud of the gravest character.”

There are one or two minor questions as to costs with which I can deal very shortly. It is said that the costs of the application for a further examination of the plaintiff on commission ought not to have been made costs in the suit. I think that was quite right.

Then it is said that Nundo Lal, who made an application for the appointment of a receiver, which application failed, ought not to have been ordered to pay the costs of that application. I think that order was right. It was his application, it failed, and no reason has been shown, why he should not pay the costs.

(1) (1878) L. R. 8 Ch. App. 881, 887.

Then it is said that Pashupati ought to have been ordered to pay the costs of the suit jointly with the appellant Nundo Lal. His position was this. His action as an executor is open to grave censure, but he did not resist the plaintiff's present claim. The Court below was right in not making him pay the costs of the plaintiff, but in making him pay his own costs.

I have now dealt with the many points which have been raised in the case. In my opinion the judgment of the Court below was quite right save that it must be varied by a declaration that the testator did not die intestate as to his joint moveable property, and with that slight variation, which does not deal with a very substantial matter, the appeal must be dismissed with costs. Such slight variation ought not to affect the costs of the appeal.

As regards appeal No. 29 of 1900, the appeal by Kadumbini Dassi, it is only on the question of costs. It is said that she ought to have had her costs either from the plaintiff or out of the testator's estate.

Now what has been her attitude in this litigation? So far as the suit sought to set aside the trust deed of the 24th of May 1877, she, as surviving trustee of that deed, was a necessary party to the suit. But she has supported Nundo Lal Bose not only in her pleadings, but also by her evidence. Nundo Lal Bose has singularly failed in his defence, and I do not see how under such circumstances Kadumbini can properly ask for costs from the plaintiff or out of the testator's estate. The Court below was perhaps rather generous in not making her pay some costs. This appeal also must be dismissed with costs.

BANNERJEE J. I am of the same opinion.

HILL J. I concur.

Attorney for appellant: *Harendra Nath Dutta.*

Attorney for respondent, Nistarini Dassi: *J. C. Dutt.*

Attorneys for respondent, Pashupati Nath Bose: *G. C. Chunder & Co.*

Attorney for respondent, Kadumbini Dassi: *Ramesh Chandra Basu.*

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CRIMINAL REVISION.

SADHU LALL

v.

RAM CHURN PASI.

1902

June 8.

Sanction to prosecute—Appeal—Revocation of sanction by Joint Magistrate specially authorised to hear appeals, legality of—Jurisdiction—Subordinate Court—Criminal Procedure Code (Act V of 1898) ss. 195 and 407.

Where a Joint Magistrate who had been authorised by the District Magistrate to hear appeals under s. 407, cl. (2) of the Criminal Procedure Code, on appeal revoked a sanction to prosecute granted under s. 195 of the Code by an Assistant Magistrate exercising second-class powers :

Held, that the existence of the special power which was conferred on him by the District Magistrate did not constitute the Joint Magistrate the Court to which appeals ordinarily lay under s. 195, cl. (7) from a Magistrate exercising second-class powers, and that his order revoking the sanction must be set aside as having been made without jurisdiction.

RULE granted to the petitioner Sadhu Lall.

This was a Rule calling on the District Magistrate to show cause why the order made by the Joint Magistrate on the 28th January 1902 revoking the sanction which had been granted by the Assistant Magistrate should not be set aside on the ground that the Joint Magistrate had no jurisdiction to revoke the sanction.

The petitioner applied for sanction under s. 195 of the Criminal Procedure Code to prosecute one Ram Churn Pasi and certain other persons for giving false evidence in a criminal case against the petitioner. The Assistant Magistrate of Bhagulpur, before whom the application was made and who exercised second-class powers, granted sanction on the 14th January 1902. Ram Churn Pasi and another appealed to the Joint Magistrate of Bhagulpur, who had been authorised by the District Magistrate under s. 407, cl. (2) of the Criminal Procedure Code to hear appeals,

* Criminal Revision No. 276 of 1902, against the order passed by E. E. Forrester, Esq., Joint Magistrate of Bhagulpur, dated the 28th of January 1902.

and who on the 28th January, 1902, revoked the sanction given by the Assistant Magistrate.

Mr. Sen Gupta and Babu Jnanendra Nath Sarkar for the petitioner. The Assistant Magistrate who granted the sanction exercised second-class powers, and under s. 195, cl. (7), appeals would ordinarily lie from him to the Court of the District Magistrate. The Joint Magistrate was authorised by the District Magistrate to hear appeals. Those appeals could only be heard by him under the special powers conferred on him by the District Magistrate under s. 407, cl. (2). The special powers, thus conferred, did not constitute the Joint Magistrate the Court to which appeals would ordinarily lie under s. 195, cl. (7), from the Court of a Magistrate exercising second-class powers, and the order by the Joint Magistrate revoking the sanction was made without jurisdiction.

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STEVENS AND HARRINGTON JJ. In this case one Sadhu Lall applied for sanction under section 195 of the Code of Criminal Procedure to prosecute certain persons for giving false evidence in a criminal case. The Assistant Magistrate before whom the application came granted it. The Magistrate who granted it exercised second-class powers. Two of the persons against whom the sanction was granted applied for the revocation of that sanction. Their application was made to the Joint Magistrate, and he revoked the sanction given by the Assistant Magistrate.

A Rule was granted calling upon the District Magistrate to show cause why the order revoking the sanction should not be set aside on the ground that the Joint Magistrate had no jurisdiction to make it.

In section 195, clause (7), it is provided that for the purposes of the section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie. In the present case the Court of the Joint Magistrate was not that to which appeals ordinarily lay; but the Court to which appeals ordinarily lay was that of the District Magistrate. It is true that under section 407, clause (2), the District Magistrate might direct that an appeal under that section, or any class of appeals should be heard by any Magistrate of the first class subordinate to him

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and empowered by the Local Government to hear such appeals. Under this section he had authorised the Joint Magistrate to hear appeals; but those appeals can only be heard by the Joint Magistrate under the special power which was conferred on him by the District Magistrate under section 407, clause (2), and the existence of that power does not constitute the Joint Magistrate the Court to which appeals ordinarily lie under section 195, clause (7).

For these reasons we think that the Joint Magistrate took a mistaken view of his powers in respect of the sanction under section 195. His order revoking that sanction must therefore be set aside.

The Rule is accordingly made absolute.

Rule made absolute.

D. S.

APPEAL FROM ORIGINAL CIVIL.

KALI CHARAN SIRDAR

v.

SARAT CHUNDER CHOWDHRY.*

1903

February 5.

Arbitrator—Award—Misconduct—Application to the Presidency Small Cause Court to set aside an award—Small Cause Court, jurisdiction of—Civil Procedure Code Act (XIV of 1882) ss. 521 and 622.

The Presidency Small Cause Court has jurisdiction to entertain an application under s. 521 of the Civil Procedure Code, and the High Court cannot interfere (under s. 622 of the Code), merely because such Court has taken, in the exercise of its jurisdiction, a mistaken view as to what does or does not constitute misconduct.

Misconduct in s. 521 of the Code does not of necessity imply corruption.

The High Court cannot interfere under s. 622 of the Code, unless it is satisfied that the lower Court has acted in the exercise of its jurisdiction illegally.

Amir Hassan Khan v. Sheo Baksh Singh(1) referred to.

APPEAL by the plaintiff, Kali Charan Sirdar, from an order of STEPHEN J.

One Kali Charan Sirdar brought a suit in the Presidency Small Cause Court against the defendants, Sarat Chunder Chowdhry, Anookul and Probodh, for the recovery of Rs. 641-10 under the following circumstances. The defendants engaged Kali Charan Sirdar as a sub-contractor under them in executing certain foundation works, etc. This was commenced on the 1st June 1901 and finished about the 12th January 1902, and the price of the work executed between that period amounted to Rs. 671-10. The defendants, however, only paid the sum of Rs. 30, leaving a

* Appeal from Original Civil No. 26 of 1902.

Appellate Bench: Sir Francis W. Maclean, K.C.I.B., Chief Justice, Mr. Justice Hill, Mr. Justice Stevens.

(1) (1884) I. L. R. 11 Calc. 6.

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balance of Rs. 641-10 still due to the plaintiff. Thereupon the plaintiff instituted the above suit on the 30th January 1902, to recover that amount.

The defendants in their written statement alleged that the suit was bad for misjoinder and non-joinder of parties, and admitted a liability of Rs. 300, and paid Rs. 150.

On the 8th April 1902, by consent of the parties, the suit was referred to the arbitration of Babu Kristo Mullick, a pleader of the Small Cause Court, who on the 5th June 1902 made an award in favour of the plaintiff, Kali Charan Sirdar, for Rs. 325-4 with costs.

On the 9th June 1902, the plaintiff applied to the Small Cause Court to set aside the award on the following grounds : (1) that the arbitrator was wrong in deducting some payment in that suit which was made for work done in another house, for which no suit was instituted ; (2) that the arbitrator was wrong in not taking into consideration the work done by the plaintiff ; (3) that the arbitrator was wrong in not measuring the work done by the plaintiff.

On the 16th June 1902, the award was set aside by the Small Cause Court, and on the 24th June the defendants applied to the same Court to set aside the above order passed on the 16th June, and to restore the suit, but this application was dismissed on the 4th July 1902.

The defendants then obtained a rule in the High Court against the plaintiff under s. 622 of the Code of Civil Procedure calling upon him to show cause why the order passed on the 16th June 1902 by the Small Cause Court should not be set aside.

On the 11th August 1902 the motion came on before Mr. Justice Stephen, who made the rule absolute observing as follows :—

“The matter in dispute in the Small Cause Court was referred to arbitration, and I have not much doubt that what was referred to arbitration was all matters in dispute.

It may have been, and very likely was, understood that the arbitrator should go into some question of measurement, but if that was intended to be the only or main matter of reference this should have been made clear.

It is said that the arbitrator's failure to measure was misconduct under section 521(a), Civil Procedure Code. I think this is clearly not so. The misconduct

there mentioned is conduct coupled with corruption. The jurisdiction of the Court was in fact transferred to the arbitrator, and the Court had no right therefore to review his judgment. Therefore I think the Small Cause Court acted illegally within the meaning of section 622 ;. and I direct that the order of 16th June setting aside the award be quashed and the subsequent proceedings set aside, and a decree be made in accordance with the award."

From this judgment the plaintiff appealed.

Mr. N. Chatterjee (*Mr. B. Acharya* with him) for the appellant. The Lower Court was wrong in saying that it had the power to set aside an order of the Small Cause Court under s. 622 of the Code: *Chattar Singh v. Lekhraj Singh*(1). The Judge in the Small Cause Court has not acted illegally or with material irregularity: see *Mohunt Bhagwan Ramanuj Das v. Khetter Moni Dassi*(2), *Enat Mondul v. Baloram Dey*(3), and *Monomohini Chowdhurani v. Nara Narayan Roy Chaudhri*(4) and *Amir Hassan Khan v. Sheo Baksh Singh*(5).

As to the word "misconduct" see *Toolsee Money Dassee v. Sudevi Dassee*(6). The Lower Court has held that misconduct is coupled with corruption. I have not found any case in which such a decision has been made.

Mr. Sinha (*Mr. A. Ghose* with him) for the respondents. The points in this case are whether there has been misconduct within the meaning of s. 521 of the Civil Procedure Code, and if so, whether the Court has power to set aside an order of the Small Cause Court under s. 622 of the Code, and whether the Small Cause Court Judge has jurisdiction to set aside an award.

The jurisdiction to set aside an award must be upon the grounds set out in s. 521 of the Code—*Nusserwanjee Pestonjee v. Meer Mynooddeen Khan Wallud*(7).

The case of *Toolsee Money Dassee v. Sudevi Dassee*(6) cited by the other side is quite a different case to the present.

(1) (1883) I. L. R. 5 All. 293.

(2) (1896) 1 C. W. N. 617, 26.

(3) (1899) 3 C. W. N. 581.

(4) (1899) 4 C. W. N. 456.

(5) (1884) I. L. R. 11 Calc. 6.

(6) (1899) I. L. R. 26 Calc. 361.

(7) (1855) 6 Moore's I. A. 134.

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MACLEAN C. J. This appeal must succeed. The history of the case is stated in the petition of the present respondents to this Court, filed on the 14th July 1902, when they applied for a rule under section 622 of the Code.

The only question before us is whether or not this Court was justified in interfering under that section.

Before this Court can interfere under that section, it must be satisfied that the Small Cause Court has acted in the exercise of its jurisdiction illegally, for it is upon that ground, and upon that ground alone, that the application is based.

A somewhat halting reference was made as to its having acted, in the exercise of its jurisdiction, with material irregularity, but this was not pressed. It has not been seriously contended that the Small Cause Court had not jurisdiction to set aside the award in question under section 521 of the Code, if the applicant brought his case within that section.

That section does not deal with the question of jurisdiction, but specifies the grounds upon which an award may be set aside.

The most that can be said here—and it is said—is that the Small Cause Court took an erroneous view of what amounted to misconduct, and, therefore, that this Court could interfere under section 622. I dissent from this proposition. If the Small Cause Court did take such erroneous view, it only means that it formed a wrong conclusion upon the evidence, or, at the highest, has fallen into an error of law.

But in neither of these views, taking them to be substantiated, could it be said that the Court acted in the exercise of its jurisdiction illegally (see *Amir Hassan Khan v. Sheo Baksh Singh*(1). I respectfully dissent from the learned Judge in the Court below when he says that misconduct under section 521 of the Code means conduct coupled with corruption. Corruption necessarily implies misconduct; but misconduct does not of necessity imply corruption.

An award may often be set aside on the ground of misconduct, which does not amount to corruption. The section says “corruption” or “misconduct.” The Small Cause Court had jurisdiction to entertain the application, and we cannot interfere

(1) (1884) I. L. R. 11 Calc. 6.

under section 622 because the Court has taken, if it has taken, in the exercise of that jurisdiction a mistaken view as to what does or does not constitute misconduct.

The appeal must be allowed with costs both here and in the Court below.

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HILL J. I concur.

STEVENS J. I concur.

Appeal allowed.

Attorney for the appellant: *K. N. Gangooly.*

Attorney for the respondents: *S. C. Mitter.*

R. G. M.

CRIMINAL REVISION.

BISHWANATH DAS

v.

KESHAB GANDHABANIK.*

1902
June 10.

*Defamation—Charge—Publication—Malice, omission to apologise no proof of—
Penal Code (Act XLV of 1860) ss. 499 and 500—Criminal Procedure Code
(Act V of 1898) s. 222.*

Where an accused person was convicted of defamation under s. 500 of the Penal Code, upon a charge which set out that the defamation was committed on or about the 12th day of April, and afterwards, by describing the complainant as a *Brithial Bania* :

Held, that the charge was not a proper charge, inasmuch as it did not set forth the particular occasions on which the defamation was said to have been committed, so as to give the accused person an opportunity of defending himself with reference to each act alleged to have been committed by him.

Where the accused, who was the collecting *panchait* of his village, was alleged to have defamed the complainant, by giving a *chaukidari* receipt to him, in which he was described by the designation of *Brithial Bania* :

Held, that the delivery of such a receipt was not a publication such as would render the accused liable to punishment for defamation, nor could the omission of the accused to apologise to the complainant subsequently, for the use of the caste designation, be taken as indicating that he used it at the time with a malicious intention.

RULE granted to the petitioner Biswanath Das.

This was a Rule calling upon the District Magistrate to show cause why the conviction and sentence of the petitioner under s. 500 of the Penal Code should not be set aside on the ground that the acts of the petitioner did not amount to the offence of defamation.

The petitioner was the collecting *panchait* of his village. It was alleged that he defamed the complainant, Keshab Gandhabanik, by giving a *chaukidari* receipt to him on the 12th April 1901, in which he was described as a *Brithial Bania*. The complainant,

* Criminal Revision No. 221 of 1901, against the order passed by G. C. Nag, Esq., Subdivisional Officer of Goalparah, dated the 31st of December 1901.

who was a goldsmith by profession, claimed to belong to a much superior caste called *Gandha Bania*. At the census, in accordance with official orders, a number of persons, amongst whom the complainant was included, were described in the census papers as *Brithial Banias*; but subsequently on a remonstrance by some of them, including the complainant, the caste designation was altered to *Gandha Bania*, but there was nothing to show that the petitioner had any information of the alteration.

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The petitioner, it was also alleged, sent a letter to the *panchait* of a neighbouring village desiring him to co-operate with him in putting an end to the pretension of persons who, being really *Brithial Banias*, wished to be described as *Gandha Banias*. It was further alleged that he informed a certain assembly, which had met for the purpose of worship, that the complainant belonged to the caste of *Brithial Banias*.

The petitioner was charged with having defamed the complainant on the 12th day of April, and afterwards by describing him as *Brithial Bania*. The charge, however, did not set forth the particular occasions on which the defamation was said to have been committed. He was convicted under s. 500 of the Penal Code by the Subdivisional Officer of Goalparah on the 31st December 1901 and sentenced to pay a fine.

M. Syed Shamsul Huda for the petitioner.

Babu Kritanta Kumar Bose for the opposite party.

STEVENS AND HENDERSON JJ. The petitioner before us has been convicted under section 500 of the Indian Penal Code of committing defamation in respect of the complainant by describing him and others of his caste as *Brithial Banias*. This Rule was granted to show cause why the conviction and sentence should not be set aside on the ground that the acts of the petitioner do not amount to the offence of defamation.

It appears that in the Province of Assam a caste originally known as *Haris* and more euphemistically described as *Brithials*, that is, persons following an occupation, have to a considerable extent risen in the social scale, and that in many cases they now follow occupations of a much higher class than that belonging

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to their original caste. For instance, they sometimes exercise the craft of goldsmith. At the recent census, in accordance, as it appears from the evidence, with official orders, a number of persons, amongst whom the present complainant was included, were described by the enumerators in the census papers as *Brithial Banias*, although subsequently on a remonstrance by some of them, also apparently including the complainant, the caste designation was altered to *Gandha Bania*.

The petitioner before us is, it seems, the collecting *panchait* of his village. He is said, as appears from the evidence, to have defamed the complainant by giving a *chaukidari* receipt to him in which he is described by the designation of *Brithial Bania*, and also by sending a letter to the *panchait* of a neighbouring village desiring him to co-operate with him in putting an end to the pretensions of persons who, being really *Brithial Banias*, wished to be described as *Gandha Banias*. He is also said to have informed a certain assembly, which had met for the purpose of worship, that the complainant belonged to the former caste.

There has not been a proper charge in the case. The charge sets out that the defamation was committed on or about the 12th day of April and afterwards by describing the complainant as *Brithial Bania*. The charge does not set forth the particular occasions on which the defamation is said to have been committed, so as to give the accused person, now the petitioner, an opportunity of defending himself with reference to each act alleged to have been committed by him.

The 12th of April is apparently the date of the *chaukidari* receipt. The delivery of such a receipt to the complainant himself was obviously not a publication such as would render the petitioner liable to punishment for defamation. As regards the other two occasions there is no definite finding by the Deputy Magistrate in his judgment. The letter was not written or signed by the petitioner himself; but it was written by a nephew of his who has given evidence in the case. The nephew states that he himself wrote the letter and that he did not write it under the instructions of the petitioner. All that the Deputy Magistrate says on this subject is that there cannot in his mind be any doubt that the denial of the witness that he wrote the letter under the instructions

of the accused is prompted only by a desire to save his uncle. In other words, if this can be taken to be a finding against the petitioner, it is a finding not only not upon evidence, but against the evidence in the case.

As regards the statement said to have been made before the religious assembly, there is no distinct finding on the subject.

We think that even if the petitioner did make the statement in question on the occasions on which he is alleged to have made it, to the effect that the complainant and others similarly situated belonged to the caste of *Brithial Banias*, he would not be liable to conviction for defamation, unless it could be shown that he did so otherwise than in good faith. We have already said that these persons were, under official instructions, so described in the census papers, and there is nothing to show that the petitioners had any information of the alteration which is said to have been subsequently made in the caste designation in those papers.

As regards the intention of the petitioner, the Deputy Magistrate states in his judgment as follows: "That the epithet was applied with a malicious motive is proved by the fact that when the complainant and his caste-men objected to it, the accused did not apologise to them for his inadvertent use of it towards them. Before this Court also the complainant has not expressed regret for his act."

It seems to us that the subsequent omission of the petitioner to apologise for the use of the caste designation in question cannot be taken as indicating that he used it at the time with a malicious intention.

It is stated by the complainant in evidence (and in his explanation, which has been submitted in showing cause against this Rule, the Deputy Magistrate has referred to the circumstance) that the petitioner endeavoured to obtain from the complainant and from his caste-fellows a payment of Rs. 100 as an inducement to describe them as they desired to be described. There is no finding in the judgment that such an attempt was in fact made by the petitioner; indeed there is no mention of the matter at all. If the Deputy Magistrate believed that that was the case, he should certainly have recorded a definite finding on the subject.

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On the whole we think that the conviction of the criminal offence of defamation was not justified, and that if the complainant considers himself aggrieved by the action of the petitioner his proper remedy lies in a suit in the Civil Court.

The Rule is made absolute and the conviction and sentence are set aside. The fine, if realised, or so much thereof as may have been realised, must be refunded. If the amount which was directed to be paid to the complainant by way of compensation has in fact been paid to him, he must refund it.

Rule made absolute.

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APPELLATE CIVIL.

ASHRAFUDDIN AHMED

v.

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December 11.

Insolvency—Civil Procedure Code (Act XIV of 1882) s. 357—Debt not included in the Schedule—Insolvent Debtor, discharge of—Right of creditor, not in the Schedule, against the discharged insolvent's property—Limitation Act (XV of 1877) Schedule II, articles 178-179.

A creditor whose debt has not been included in the scheduled debts within the meaning of s. 357 of the Code of Civil Procedure, is entitled to proceed with the execution of his decree against the insolvent's property, notwithstanding his discharge.

Haro Pria Dabia v. Shama Charan Sen(1) and *Sheoraj Singh v. Gauri Sahai*(2) referred to.

On an application for execution of a decree having been made by the decree-holder, the salary of the judgment-debtor was attached. The judgment-debtor having represented that, as all his property had vested in a Receiver, he having taken insolvency proceedings, the execution could not be carried on, the Court released from attachment the salary of the judgment-debtor which had been attached. Subsequently the insolvency proceedings came to an end by the discharge of the Receiver. Within three years from the final discharge, the decree-holder made another application asking the Court to revive his former application for execution. The judgment-debtor objected to the execution on the ground that it was barred by limitation:

Held, that the case was governed by article 178, Schedule II of the Limitation Act, and that the present application was one in continuation of the previous application, and it having been made within three years from the time when the decree-holder became entitled to ask the Court to revive his former application by reason of the insolvency proceedings having been brought to an end by the discharge of the Receiver, was not barred by limitation.

Where a decree directed that the "plaintiff shall not be able to take out execution of decree until the disposal of petition for insolvency made by the defendants before the District Judge of Patna" and the application for execution

* Appeals from Orders Nos. 84, 138, 202, 208, and 240 of 1901, against the order of Babu Hemango Chunder Bose, Subordinate Judge of Hooghly, dated the 22nd December 1900.

(1) (1839) I. L. R. 16 Calc. 592.

(2) (1899) I. L. R. 21 All. 227.

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not made until after three years from the date of the order of the first Court in the insolvency proceedings:

Held, that the limitation applicable to the execution of such decree was that provided for by article 178, Schedule II of the Limitation Act (XV of 1877), and that the application for execution was barred by limitation, it not having been made within three years from the date of the order of the first Court under s. 351 of the Civil Procedure Code, granting the petition for insolvency, when the right to make the application first accrued.

Muhammad Islam v. Muhammad Ahsan(1) referred to.

APPEALS Nos. 84 and 138 by the judgment-debtor Ashrafuddin Ahmed.

These appeals arose out of certain execution proceedings. The petitioner was one Bepin Behary Mullick, who obtained a decree for money against one Syed Ashrafuddin Ahmed Khan Bahadur on the 1st May 1895. The decree-holder then applied to the Subordinate Judge of Hooghly for execution of his decree and the salary of the judgment-debtor was attached. The judgment-debtor, who was declared an insolvent, filed a petition of objection, stating that as all his attachable properties had vested in the Receiver appointed by Court, proceedings in execution of the decree could not be carried on. Accordingly, on the 12th December 1896, the Court released from attachment the salary of the judgment-debtor. Against that order the petitioner appealed to the High Court and the said appeal was dismissed on the 14th March 1898. The name of the decree-holder, Bepin Behary, was not included in the schedule of the creditors filed by the judgment-debtor in the insolvency proceedings. The insolvent judgment-debtor obtained his final discharge in the month of June 1899, and the Receiver's duties came to an end. Thus the legal bar having come to an end, the decree-holder presented a petition on the 20th November 1900 in the Second Court of the Subordinate Judge at Hooghly, and prayed that the Court might be pleased, after service of notice on the judgment-debtor, to hold this petition to be a continuation of the previous execution proceedings, and that the salary of the judgment-debtor might be attached. The defence of the judgment-debtor was that, he having been declared an insolvent, the decree-holder had no right to execute the decree, and that the application for execution was barred by limitation.

(1) (1894) I. L. R. 16 All. 237.

The learned Subordinate Judge of Hooghly, Babu Hemango Chunder Bose, having overruled the objections of the judgment-debtor, allowed the decree-holder's application.

Babu Saligram Singh and *Dr. Ashutosh Mukerjee* for the appellant.

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Dr. Rash Behary Ghose and *Babu Jadunath Kanjilal* for the respondent.

APPEALS Nos. 202 and 203 by the decree-holder Bepin Behary Mullick; and appeal No. 240 by the judgment-debtor No. 1, Ashrafuddin Ahmed.

These appeals also arose out of applications for execution of decrees. The decree-holder obtained two decrees for money against one Syed Ashrafuddin Ahmed and his brother Mr. A. Ahmed. One was dated 28th May 1896 and the other 30th June 1896. As at the time, when these decrees were passed, the judgment-debtors instituted insolvency proceedings in the decree dated the 28th May 1896, it was directed that "the plaintiff may refrain from taking out execution of decree until the disposal of the insolvency petition made by the defendants or until such time as may be required for that purpose;" and in the decree dated the 30th June 1896 it was directed that "the plaintiff shall not be able to take out execution of his decree until the disposal of the petition for insolvency made by the defendants before the District Judge of Patna." The decree-holder in the year 1896 took out execution of his decrees, and in his application he prayed for apportionment of the then attached salary of the judgment-debtor No. 1, Ashrafuddin Ahmed. The judgment-debtors were declared insolvents and a Receiver was appointed on the 1st December 1896 and the attachment was removed. The judgment-debtors obtained their final discharge on the 3rd June 1899. Thus the legal bar having come to an end, the decree-holder made these applications for execution (one was dated 12th January 1901, and the other 9th January 1901) not only against judgment-debtor No. 1, but also against the other judgment-debtor. The defence mainly was that the applications for execution were barred by limitation. The Court below held that the application dated the 12th January 1901 was barred as against judgment-

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debtor No. 2, Mr. A. Ahmed, but it was not barred against judgment-debtor No. 1, and he also held that the application dated the 9th January 1901 was barred against all the judgment-debtors.

*Dr. Rash Behary Ghosh and Babu Jadunath Kanjilal* for the appellant.

*Babu Ram Charan Mitter, Babu Saligram Singh and Dr. Ashutosh Mookerjee* for the respondent.

In appeal No. 240, *Babu Saligram Singh and Dr. Ashutosh Mookerjee* for the appellant.

*Babu Jadunath Kanjilal* for the respondent.

**BANKERJEE AND GRIFF JJ.** These five appeals, Nos. 84, 138, 202, 203 and 240, arise out of certain execution proceedings.

Appeals Nos. 84 and 138 are on behalf of the judgment-debtor, and raise the following questions, namely, *first* whether the Court below is right in holding that the decree-holders are entitled to execute their decree notwithstanding certain insolvency proceedings, which resulted in the judgment-debtor being declared insolvent and his property being rateably distributed amongst certain of his creditors; and, *second* whether the Court below is right in holding that execution is not barred by limitation.

Upon the first question it is found, and that finding has not been successfully impugned, that the moneys for which the decree-holders, respondents, have taken out execution are not included in the scheduled debts within the meaning of section 357 of the Code of Civil Procedure. That being so, the insolvency proceedings cannot, in our opinion, be a bar to the present execution. The view we take is in accordance with that taken by this Court in the case of *Haro Pria Dabia v. Shama Charan Sen*(1); and no reason is shown for our saying that that case was wrongly decided, and that the question now raised should be referred to a Full Bench. On the other hand, we may observe that that case has been followed by the Allahabad High Court in the case of *Sheoraj Singh v. Gauri Sahai*(2).

(1) (1880) I. L. R. 16 Cal. 592.

(2) (1899) I. L. R. 21 All. 227.

As to the second point the facts are these : after the decree-holders had applied for execution of the decree, the judgment-debtor represented that, as all his property had vested in a Receiver, proceedings in execution could not be carried on, and thereupon the Court released from attachment the salary of the judgment-debtor, which had been attached at the instance of the decree-holders. What the decree-holders now ask the Court to do is to re-attach the salary of the judgment-debtor, and to allow them to proceed with the execution case originally instituted by them from the point which it had reached, and at which it was stopped by the order of the Court. That being so, the present application has rightly been held to be no fresh application for execution, but a mere continuation of the previous application; and the period of limitation applicable to it is that prescribed by article 178 of the second schedule of the Limitation Act, and not by article 179. If that is so, the application is made within three years from the time when the decree-holders became entitled to ask the Court to revive the former application by reason of the insolvency proceedings having been brought to an end by the discharge of the Receiver.

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The view we take is amply supported by the cases of *Raghunath Sahay Singh v. Lalji Singh*(1) and *Rudra Narain Guria v. Pachu Maity*(2).

Appeals Nos. 84 and 138 must therefore be dismissed with costs.

The next appeal is No. 202 of 1901. That is an appeal on behalf of the decree-holder, and the point raised in that appeal is whether the Court below was right in holding that execution was barred as against the judgment-debtor No. 2. It is conceded that the present application, as against the judgment-debtor No. 2, must be treated as a fresh application, as no relief was asked for as against him in the previous proceedings. That being so, it must be shown, either that it is made within three years from any of the dates mentioned or referred to in article 179, or that it comes within article 178 for some reason other than that of its being a continuation of the previous application. Now, it is not shown that it is made within three years from any of the dates

(1) (1895) L. L. R. 23 Calc. 397. (2) (1896) L. L. R. 23 Calc. 437.

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mentioned in article 179. It is faintly suggested that it may come under clause (6) of that article by reason of the clause in the decree which runs in these words \* \* \* "the plaintiff may refrain from taking out execution of the decree until the disposal of the insolvency petition made by the defendants or until such time as may be required for that purpose." But it would be difficult to say that this brings the case within clause (6), which provides for a case "where the application is to enforce any payment which the decree or order directs to be made at a certain date." There is no direction in the decree that any payment is to be made at the date of the disposal of the insolvency petition, or on any other date.

It was next contended that the case comes within article 178, as being a case not provided for by article 179 or by any other article, by reason of the clause in the decree just mentioned. This raises the question whether that clause can at all have any operative effect. We are of opinion that this question must be answered in the negative. The clause in terms does not restrain the decree-holder from executing his decree until a certain date. It only gives him the liberty to refrain from taking out execution until a certain event, or a date not very certain—a liberty which he always had without any such clause in the decree. It was intended, no doubt, to be in the nature of a recommendation to the decree-holder. Nor can the decree-holder say that, as between him and the judgment-debtor who allowed the decree to contain this clause, he was at all misled by it, because we find from his own showing that he took out execution before the contingency contemplated by the clause happened, notwithstanding the existence of the clause. Appeal No. 202 of 1901 must therefore be dismissed with costs.

The next appeal, No. 203 of 1901, is also an appeal by the decree-holder, and in this appeal, too, the same question is raised, namely, whether the Court of Appeal below was right in holding that execution was barred. The clause in the decree that is here relied upon runs thus \* \* \* "the plaintiff shall not be able to take out execution of the decree until the disposal of the petition for insolvency made by the defendants before the District Judge of Patna." Here no doubt the prohibition is imperative.

And as for the reasons stated in our judgment in appeal No. 202 just disposed of, the application cannot come under article 179, it comes under article 178 of the Second Schedule of the Limitation Act.

This view is in accordance with that taken by the Allahabad High Court in the case of *Muhammad Islam v. Muhammad Ahsan*(1). But although that is so, the question still remains whether the present application was made within three years from the time when the right to make the application first accrued.

It is argued for the decree-holder (appellant) that, that date ought to be taken to be the date of the discharge of the Receiver in the insolvency proceedings, or at any rate of the final decision of the Appellate Court in the insolvency case.

On the other hand, it is argued for the respondent that the view taken by the Court below is right, and that that date is the date of the order of the first Court under section 351 granting the petition for insolvency.

We are of opinion that the view taken by the Court below is right. The terms of the clause in the decree relate to the disposal of the petition for insolvency. That petition was under section 351, Civil Procedure Code. If the clause was intended to stop execution until the final decision of the insolvency matter, it would have said so. The learned Subordinate Judge who inserted that clause in his decree had his view, so far as we can see from the terms of the clause, limited to the disposal of the case by the Court in which it was pending, and which is expressly referred to in the clause though more directly for another purpose.

We were asked to take a liberal view of the clause, as it is a clause which is connected with the limitation of the right of the decree-holder to take out execution; but we cannot shut our eyes to another view. If the decree-holder had applied for execution after the disposal of the application by the first Court, and the judgment-debtor had urged the objection that he was not competent to do so until the period of appeal had expired, it would certainly have been a sound argument on behalf of the decree-holder to say that his right to take out execution should not be

(1) (1894) I. L. R. 16 All. 237.

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construed to be restrained longer than was necessary under the strict terms of the clause in the decree. Then again, looking to the reason of the thing, we are of opinion that the stay of execution which the order as construed by the Court below would allow, was sufficient for all purposes. If the application for insolvency was refused, there could be no objection to execution being taken out immediately. If it was granted and further stay of execution was necessary, the subsequent proceedings that were followed by the vesting of the property in a Receiver would insure such further stay as might be necessary. So that there is no reason to suppose that the Court which inserted that clause in its decree had any reason for giving to that clause any longer operation than the Court below has construed it to have.

For these reasons appeal No. 203 of 1901 must also be dismissed with costs.

Appeal No. 240 of 1901 has been disposed of by the decision in appeal No. 84 of 1901, the only point involved being whether the present application for execution is barred by limitation. That appeal must, therefore, also be dismissed with costs.

*Appeals dismissed.*

S. C. G.

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## CRIMINAL REVISION.

JAGOBUNDHOO KARMAKAR

v.

EMPEROR.\*

1903

May 27.

*Complaint—Petition to Collector against subordinate officer of Court of Wards—Dismissal of petition—Witnesses, opportunity to call,—Sanction to prosecute—False charge—Penal Code (Act XLV of 1860) s. 211—Code of Criminal Procedure (Act V of 1898) ss. 4(b) and 198.*

A petition to the Collector as the superior officer of the Court of Wards directed against one of his official inferiors, a subordinate officer of the Court of Wards *cutchery*, asking the Collector, as the head of the department, to redress the grievances of the petitioner, is not a complaint within s. 4, cl. (A) of the Code of Criminal Procedure.

Where on such a petition being presented, the Collector saw the petitioner and got him to repeat the statement made in the petition on oath and dealing with it judicially as if it were a complaint dismissed it, without giving the petitioner an opportunity of calling his witnesses, and ordered his prosecution under s. 211 of the Penal Code:

*Held*, that the order for the prosecution of the petitioner under s. 211 of the Penal Code should be set aside, as the Collector was not justified in arbitrarily turning a departmental complaint into a criminal complaint, and that if he had been justified in taking the course that he did, he should have given the petitioner an opportunity of calling his witnesses and proving his allegations.

**RULE** granted to the petitioner, Jagobundhoo Karmaakar.

This was a Rule calling on the District Magistrate of Backergunge to show cause why his order of the 23rd January 1902, sanctioning the prosecution of the petitioner under s. 211 of the Penal Code, should not be set aside on the grounds (1) that the petition addressed to the Collector as the superior officer of the Court of Wards against a subordinate officer of the Court of Wards *cutchery* within his jurisdiction, was not a complaint as defined by the Code of Criminal Procedure; (2) that even if it was conceded that the petition was a complaint, the Magistrate

\* Criminal Revision No. 214 of 1903, made against the order passed by D. Weston, Esq., District Magistrate of Backergunge, dated the 23rd January 1902.

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ought not to have dismissed it, nor should he have sanctioned the prosecution of the petitioner without examining his witnesses.

On the 13th January 1902, the petitioner presented a petition to the Collector, who was also the District Magistrate of Backergunge, against the *tehsildar* of the Amrajuri Court of Wards *cutchery*, stating that the *tehsildar* had the petitioner forcibly brought from his house by some peons, and compelled him to remain at the office, refusing to allow him to go elsewhere until he paid a certain sum of money, and the petitioner asked for redress of the grievance.

The Collector examined the petitioner on the 23rd January 1902, and then, after examining a number of officers of the *cutchery*, dismissed the petition and sanctioned his prosecution under s. 211 of the Penal Code without giving the petitioner an opportunity of calling his witnesses to substantiate the statements made by him in his petition.

*Babu Sarat Chunder Roy Chowdhury* for the petitioner. I submit that the petition I presented to the Collector did not amount to a complaint under the Code of Criminal Procedure. It never was my intention that the Collector should take action criminally as a Magistrate: my petition was addressed to the Collector, as the superior officer of the Court of Wards, against a subordinate officer of the Court of Wards *cutchery*, asking the Collector to act departmentally and to redress my grievance. The Collector had no right, I submit, to turn a departmental complaint into a criminal one. Even if he could do so, he is bound before dismissing my complaint and sanctioning my prosecution to give me an opportunity of proving the statements in my petition by calling my witnesses; but this he has refused to do. I submit that under the circumstances the order for my prosecution should be set aside.

No one appeared for the Crown.

**STEVENS AND HARRINGTON JJ.** In this case the Rule was granted calling upon the District Magistrate to show cause why the order directing the prosecution of the petitioner for an offence under section 211 of the Indian Penal Code should not be set aside.

It appears that the petitioner presented to the Collector a complaint as to the conduct of one of the Collector's subordinates, a *tehsildar*, who, it was alleged, compelled him to go to the office, and kept him there until he paid some money, and the petition ended with the prayer that the Collector should redress the petitioner's grievances. The Collector proceeded to deal with the case as though it was a complaint within the meaning of section 4 of the Code of Criminal Procedure. He did not believe the statement of the petitioner; he did not give the petitioner an opportunity of calling his witnesses to substantiate the statements in his petition to the Collector, but purporting to act judicially, he dismissed the complaint and ordered the prosecution of the petitioner for an offence under section 211.

In our opinion this order must be set aside. In the first place, a petition to the Collector directed against one of his official inferiors, and asking the Collector, as the head of the department, to redress the grievances of the petitioner, is not a complaint within section 4, clause (h) of the Code of Criminal Procedure. The Magistrate in fact does not contend that it is, but he says that when he saw the petitioner and got the petitioner to repeat his statement on oath, that statement amounted to a complaint.

In our opinion the Magistrate was not justified in arbitrarily turning a departmental complaint into a criminal complaint. Moreover, if the Magistrate had been justified in taking the course that he did, he would still have been bound, if acting judicially, to have given the petitioner an opportunity of calling his witnesses and proving his allegations. He did not do so. We think, therefore, that his proceedings were not warranted by law.

We accordingly make the Rule absolute. The order for prosecution under section 211 is set aside.

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 June 10.

## JOWAHIR PATTAK

v.

## PARBHOO AHIR.\*

*Criminal Intimidation—Threat to ruin another by cases—"Injury"—Penal Code  
 (Act XLV of 1860) ss. 44, 508 and 506.*

In order to convict a person of criminal intimidation under s. 506 of the Penal Code, it must be found that there was a threat by him to another person of injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested,

Where the petitioner who threatened to ruin the complainant by cases was convicted of criminal intimidation under s. 506 of the Penal Code:

*Held*, that the conviction could not stand. Had the threat been to ruin the complainant by false cases, the offence of criminal intimidation would have been committed; but as the threat was to ruin him by cases, it could not be assumed that by cases were meant false cases. If the cases were not false, the mere fact that they were instituted for the purpose of persecuting the complainant would not bring them within the definition of the term "injury."

RULE granted to the petitioner, Jowahir Pattak.

This was a Rule calling upon the District Magistrate of Shahabad to show cause why the conviction of the petitioner under s. 506 of the Indian Penal Code should not be set aside on the ground that on the face of the judgment there was reason to doubt whether the conviction was warranted by law.

The petitioner and another desired the complainant, one Parbhoo Ahir, to sell them a cow, and, on his refusing to do so, they said they would ruin him with cases. On the 30th October 1901 the threat was followed up by a long report being sent to the Subdivisional Magistrate of Buxar accusing Parbhoo Ahir of bad livelihood; but no action was taken on this report. Again on the 8th of January 1902 a petition was filed before the Magistrate against the complainant charging him with bad livelihood. The petitioner was thereupon convicted by the Subdivisional Magistrate under s. 506 of the Penal Code on the 19th February 1902, and sentenced to pay a fine of Rs. 40.

The report and the petition sent to the Magistrate were not made by the petitioner himself, but were connected by the Magis-

\* Criminal Revision No. 306 of 1902, against the order passed by R. L. Bosc, Esq., Subdivisional Magistrate of Buxar, dated the 19th February 1902.

trate who tried the case with the threats in respect of which the petitioner was convicted.

*Babu Dwarka Nath Mitter* for the petitioner. In order to convict my client under s. 506 of the Penal Code, it is necessary to find that he threatened the complainant with injury to his person, reputation or property. The word "injury" is defined by s. 44 of the Penal Code and denotes any harm illegally caused. Here the threat has been to cause harm by institution of cases, which could not be said to be a threat to cause harm illegally, but a threat to cause harm through the intervention of the Courts of Justice: *Reg. v. Moroba Bhaskarji*(1).

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ABIR.

**STEVENS AND HENDERSON JJ.** The petitioner has been convicted under section 506 of the Indian Penal Code of the offence of criminal intimidation towards the complainant.

This Rule was granted to show cause why the conviction should not be set aside, on the ground that on the face of the judgment there was reason to doubt whether the conviction was warranted by law.

Briefly stated, the facts appear to be as follows:—The petitioner and another desired the complainant, who is found to have been at one time a person of bad livelihood, to sell them a cow, and, on his refusing to do so, they said that they would ruin him with cases. The threat was afterwards followed by a report and a petition to the Magistrate against the complainant charging him with bad livelihood. The report and the petition were not made by the present petitioner himself; but they have been connected by the Magistrate who tried this case with the threats in respect of which the petitioner has been convicted.

It seems to us that the Rule must be made absolute. According to the definition of criminal intimidation in section 503 of the Indian Penal Code there must be a threat to another person of injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested. The word "injury" is defined again in section 44 as denoting any harm whatever illegally caused to any person in body, mind, reputation or property. No doubt if the threat had been to ruin

(1) (1871) 8 Bom. H. C. R. (C.C.) 101.

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the complainant by *false* cases, the offence of criminal intimidation would have been committed; but the threat was to ruin him by "cases," and it cannot be assumed that by "cases" were meant false cases. If the cases were not false, the mere fact that they were instituted for the purpose of persecuting the complainant would not bring them within the definition of the term "injury," because the harm, although caused from an improper motive, would not be caused illegally.

The Rule is therefore made absolute, the conviction and sentence are set aside, and the fine, if paid, must be refunded.

D. S.

*Rule made absolute.*

## CHUNDRA COOMAR BISWAS

v.

## CALCUTTA CORPORATION.\*

1902

April 30.

*Calcutta Municipal Act (Bengal III of 1899) ss. 502, 505—Human food, destruction of articles for—Purchase of damaged rice intending to sell it as food for pigs—Order for its destruction—Circumstances necessary to justify such order.*

In order to justify an order under s. 505 of the Calcutta Municipal Act of 1899, the Magistrate must be satisfied, and there must be a finding in his judgment that the article directed to be destroyed comes within s. 502 of the Act, and it either exposed or hawked about for sale, or deposited in, or brought to, any place for the purpose of sale or preparation for sale, and is intended for human food.

Where certain damaged rice which had been purchased by a person who intended to sell it as food for pigs, was ordered to be destroyed by a Magistrate under s. 505 of the Calcutta Municipal Act, and the judgment of the Magistrate contained no finding that the rice was brought for the purpose of sale or that it was intended for human food, but contained a finding that there always was a risk that it might be sold for human consumption to poorer classes, or might be used in a flour mill worked by unscrupulous persons:

*Held*, that the fact that this danger existed did not justify the order, and that until some attempt was made to sell the rice for consumption by the poorer classes, the Corporation was not justified in destroying the property of a man who was disposing of it in a way which was perfectly legitimate.

In this case the petitioner, Chundra Coomar Biswas, bought on the 27th February 1902, at an auction held at the Kidderpore Docks, 5,000 maunds of rice which had caught fire and had been soaked with water while on board a ship. The petitioner intended to sell the rice to owners of piggeries, and had contracted with the owner of a large piggery at Tangra to sell him about 4,000 maunds. The petitioner took a small quantity of the rice away to dry and left the remainder in the Docks.

On the 1st March 1902 a sample of this rice was taken, and an order was made by the Magistrate prohibiting the petitioner from dealing with it, and proceedings were instituted by the Calcutta Corporation against the petitioner, under the Calcutta Municipal Act of 1899, and on the 3rd March the Magistrate made an order under s. 505 of the Act for the destruction of the said rice.

\* Criminal Revision No. 240 of 1902.

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*Mr. P. L. Roy (Babu Debendra Chandra Mullick with him)* for the petitioner. The rice was not intended for human consumption, nor was it hawked about or exposed for sale within the meaning of s. 502 of the Act. It is only when food is intended for sale to human beings that the Chairman is empowered to deal with it in the manner specified in ss. 502 to 504. In the present case the rice was sold to a piggery-owner as food for pigs, and there is no finding to the contrary by the Municipal Magistrate. The Magistrate is in error in holding that the Chairman of the Corporation is entitled to seize and destroy everything which he considers to be unwholesome, irrespective of the uses for which they are intended. There is no such provision in the Act. The order made by the Magistrate under s. 505 of the Act was wholly without jurisdiction, as it proceeded upon the erroneous assumption that he was empowered to deal with private property in the way he did, without considering whether it was intended for human food. He should have satisfied himself that the article in question came within the purview of s. 502 in the first place, and it was also necessary for him to find that it was exposed for sale. The Lower Court has not found these facts, and upon the facts proved, or otherwise established in evidence, no such finding could have been arrived at. The *onus* of proving these facts is upon the prosecution, as in a criminal case. The order of the Magistrate amounts practically to a forfeiture of private property without any justification in law.

*Mr. Zorab (Rabu Dwarka Nath Chakravarti with him) contra.* The *onus* is upon the defence to show that the article was not intended for human food. The plea of the accused that the rice was intended for pigs is untrue and has not been established. The main object of these sections in the Municipal Act was to entrust the Chairman with large discretionary powers to deal with all unwholesome articles, in the interests of public health and safety. There is no question that the rice in the present case was extremely unwholesome and unfit for human food.

**STEVENS AND HARRINGTON JJ.** We think that the Rule issued on the Municipal Magistrate and the Chairman of the Corporation of Calcutta to show cause why the order made by the



former on the 3rd March last, directing that a certain quantity of rice be destroyed, should not be set aside, must be made absolute.

The facts of the case are that a man named Chundra Coomar Biswas purchased some damaged rice over the side of a ship. A fire had broken out on board the ship and a part of the cargo, which consisted of rice, had been damaged by both fire and water. This was sold over the ship's side for what it would fetch, and was purchased by the petitioner. Out of the 5,000 maunds which he purchased, he took a small quantity away to dry, and left the remainder in the Kidderpore Docks. On the 1st March (the sale having taken place on the 27th February), a sample of this rice was taken, and an order was made by the Magistrate prohibiting the petitioner from dealing with the rice. Subsequently, the case was tried before the Magistrate under the Calcutta Municipal Act of 1899, and under the provisions of s. 505 of that Act the Magistrate made an order for the destruction of the rice in question, and that is the order which the petitioner now seeks to set aside.

In order to justify an order under s. 505 the Magistrate has to be satisfied that the article directed to be destroyed comes within the provisions of s. 502 of the Municipal Act. He is to be satisfied that the article is either exposed or hawked about for sale or deposited in or brought to any place for the purpose of sale or of preparation for sale and is intended for human food. We think that it is, to say the least of it, extremely doubtful on the facts of this case whether the Magistrate could have held that the rice in question was deposited in or brought to any place for the purpose of sale or of preparation for sale, and was intended for human food. The learned Counsel who has appeared to show cause against the Rule falls back on the latter part of the section, and argues that the *onus* of showing that the article was not deposited or brought for any such purpose, or was not intended for human food, is placed upon the party charged, and that the Magistrate was justified in coming to the conclusion that this rice was so brought and intended for sale for human food. But the evidence on the record is that the petitioner stated that the rice was intended for sale as food for pigs, and he proved that he had entered into a contract with the owner of a large

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piggery for the sale of the rice in question to him. In our opinion, even assuming that the contentions of the learned Counsel were correct, and that the Magistrate could have found on the evidence that the case fell under s. 502, this evidence is amply sufficient to discharge any *onus* which may have rested on the shoulders of the party charged.

The contract in question was made on the 2nd March. It is argued that that is a circumstance which indicates that it was made for the purpose of manufacturing evidence. In our view it is equally open to the construction that it indicates the *bona fides* of the petitioner in making an arrangement to get rid of the rice for a perfectly legitimate purpose at the earliest possible opportunity. As the case stands, there is no evidence that this rice was ever intended for human consumption. There is evidence and evidence which appears to us to be satisfactory that it was intended for the consumption of pigs.

There is a further difficulty which stands in the way of the Magistrate's order, and that is that his judgment contains no finding that the rice was brought for the purpose of sale, or that it was intended for human food. Before he could have made the order that he has made, he would have been obliged to find these facts affirmatively. He does not find them, and he does not, as far as can be ascertained from the judgment, disbelieve the case set up on behalf of the petitioner. His finding is that there is always a risk, that is to say, the rice may be sold for human consumption to poorer classes, or may be used in a flour mill worked by unscrupulous persons. The fact that this danger exists does not justify the order which has been made. If any attempt is made to sell this rice for consumption by the poorer classes, then it would be the duty of the Corporation to step in and stop such a sale. But until some such attempt is made the Corporation, in our opinion, is not justified in destroying the property of a man who is disposing of that property in a way which is perfectly legitimate.

The result, therefore, is that we make the rule absolute, setting aside the order of the Municipal Magistrate dated the 3rd March last.

D. S.

*Rule made absolute.*

## CIVIL RULE.

ABDUL RAHAMAN

v.

MATIYAR RAHAMAN.\*

1902

Dec. 6.

*Deposit in Court—Civil Procedure Code (Act XIV of 1882) s. 310A—Sale in execution of decree—Co-sharer, deposit by.*

A person claiming under the Mahomedan law a share in some immoveable property which has been sold in execution of a decree against his co-sharers, cannot come in and make a deposit under s. 310A of the Civil Procedure Code.

*Ramchandra v. Rakhmabai*(1), *Paresh Nath Singha v. Nabogopal Chattopadhyaya*(2) referred to. *Srinivasa Ayyangar v. Ayyathorai Pillai*(3) distinguished.

RULE granted to Abdul Rahaman, the auction-purchaser.

This Rule arose out of an application by one Matiyar Rahaman for setting aside a sale under s. 310A of the Civil Procedure Code. It appeared, that one Abdul Ali obtained a decree for money against one Wahid Ali and Mobarakjan Bibi, and in execution of that decree held certain immoveable property belonging to them. This property originally belonged to one Aman Ali, who sold the said property to his wife, Guran Bibi, by a kabala, dated 21st Sraban 1252. In 1259 both Aman Ali and Guran Bibi died. Guran Bibi left two sons, Wahed Ali and Waridulla, a daughter, Mobarakjan, and a mother, Nisa Bibi. Nisa Bibi, who inherited a share of the daughter's property, died leaving the applicant and his brothers and a sister as her heirs. The application was objected to by the auction-purchaser, that the applicant had no *locus standi* under s. 310A of the Civil Procedure Code, and that the kabala dated the 21st Sraban 1252, set up by the applicant, was a forgery. The lower Court having found that the kabala was a *bonâ fide* transaction, and also having found that Nisa Bibi, as mother of Guran, inherited the property as an heir with the judgment-debtor and Waridulla, held that the applicant was a fractional

\* Civil Rule No. 2856 of 1902.

(1) (1898) I. L. R. 28 Bom. 450.

(2) (1901) I. L. R. 29 Calc. 1.

(3) (1897) I. L. R. 21 Mad. 416.

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owner of the property sold, and that he had an interest in it. The application was allowed and the sale was set aside.

Babu Dharendra Lal Khastgir, for the auction-purchaser, contended that the opposite party had no *locus standi* to make the application under s. 310A. The right, title and interest of the judgment-debtor only in the property was sold, and the title of the opposite party was not affected thereby at all; see the case of *Ram Chandra v. Rakhmabai*(1).

Babu Satis Chundra Ghose, for the opposite party, contended that he (*Matiyar Rahaman*) being a co-sharer had sufficient interest in the property to come in under s. 310 A of the Civil Procedure Code and to make the deposit. He is a "person whose immoveable property has been sold" within the meaning of the said section. In the case of *Paresh Nath Singha v. Nabogopal Chattopadhyaya*(2), Mr. Justice Amir Ali expressed his opinion that the words "any person whose immoveable property is sold" includes every person who has an interest in the property in question, whether qualified, partial or absolute. His Lordship was of opinion that a mortgagee, an owner of a reversion, has partial interest, and therefore they all come within the meaning and intent of the section. In the case of *Rakhal Chunder Bose v. Dwarka Nath Misser* (3), it has been held that a mortgagee has a *locus standi* to make an application under s. 311 of the Civil Procedure Code. In that section also the words are "any person whose immoveable property has been sold." In the case of *Srinivasa Ayyangar v. Ayyathorai Pillai* (4) it has been held that a mortgagee has a right to come in under s. 310A.

PRINSEP J. A person, claiming under the Mahomedan law a share in some immoveable property which had been sold in execution of a decree against his co-sharers, applied under section 310A, Code of Civil Procedure, to be allowed to make a deposit within the terms of that section, and, notwithstanding objection taken, he has been allowed to make such deposit and the sale has been accordingly set aside. A Rule has been obtained to consider this matter. It seems to me that the petitioner who

(1) (1898) I. L. R. 23 Bom. 450.

(3) (1886) I. L. R. 13 Calc. 346.

(2) (1901) I. L. R. 29 Calc. 1, 13.

(4) (1897) I. L. R. 21 Mad. 416.

made the application under section 310A is not a person within the terms of that section, as he is not a person whose immoveable property has been sold under this chapter. It is quite possible that in describing the property as the property of the judgment-debtor, his share may have been included. But that would not affect his right or title or entitle him to come under section 310A on the ground that his immoveable property has been sold. The proceedings to which he was no party cannot possibly affect him. To use the words of Mr. Justice Ranade in the case of *Ramchandra v. Rakhmabai*(1), "as his interests were not affected by the execution sale, his application was very properly rejected by the lower Court." These are cases which have been considered by us, and which have been referred to by the lower Court as authority for holding that a mortgagee may come in under section 310A. Now, so far as this Court is concerned, the cases, I believe I may correctly state, have proceeded on the ground that the sales being under the Bengal Tenancy Act would convey to the purchaser a right to avoid these incumbrances; and, therefore, it has been held that the mortgagee has such an interest in the immoveable property, that he is entitled to come in under section 310A, or, I should say more correctly, within the corresponding section, which is exactly in the same terms, namely, section 174 of the Bengal Tenancy Act. The facts of the case of *Srinivasa Ayyangar v. Ayyathorai Pillai*(2) are not fully stated; but so far as the latter part of the judgment of the learned Judges is concerned, I am unable, after fullest consideration, to agree with it, for it seems to proceed on two cases decided by this High Court, in both of which the sales would confer a right to the purchaser to avoid the incumbrances, and on this ground it was held that the encumbrancer was entitled to come in within the terms of section 310A, or rather section 174 of the Bengal Tenancy Act. The Rule must, therefore, be made absolute, and the order of the Munsiff set aside. The petitioner is entitled to his remedy under the ordinary law, and his possession, or his title, has in no way been affected by the proceedings of the sale in execution of the decree against his co-sharers.

(1) (1898) I. L. R. 23 Bom. 450 (453).

(2) (1897) I. L. R. 21 Mad. 416.

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A further objection was taken at the latest stage of the case by the learned pleader who opposes the Rule, that we have no authority to proceed in this matter under section 622, Code of Civil Procedure. We think that this is specially a case in which such interference is allowed and is necessary within the terms of that section.

The petitioner will be entitled to two gold mohurs as costs of this Rule, which is made absolute.

**STEPHEN J.** I concur entirely in the judgment of my learned brother, and I have only this to say that, on the cases which have been laid before us, and particularly on the case of *Paresh Nath Singha v. Nabogopal Chattopadhyaya*(1), it seems to me plain, that the only person or persons who may apply under section 310A, Code of Civil Procedure, are the judgment-debtor himself and certain persons claiming an interest in the property by a transfer from the judgment-debtor. In the present case, it is plain that the persons, whose right to apply it has been sought to establish, based their claim upon an interest which is no way derived from the judgment-debtor.

*Rule made absolute.*

S. C. G.

(1) (1901) I. L. R. 29 Calc. 1.

## APPELLATE CIVIL.

RAM KAMAL SHAHA

v.

AHMAD ALI.\*

1903

Jan. 7,  
Feb. 24.

*Appeal—Civil Procedure Code (Act XIV of 1882) s. 544—Appeal on grounds common to all the defendants.*

A brought a suit against B, C, D, and others, for recovery of possession of certain immoveable property on declaration of title thereto, alleging that he was dispossessed by all the defendants together. B, C, and D appeared and contested the suit mainly on the grounds that it was bad for misjoinder of parties, and that the plaintiff had no title to the land in dispute. The Court of First Instance decreed the plaintiff's suit. B and C alone preferred an appeal, and the lower Appellate Court allowed it, finding that the plaintiff had not proved the title set up by him. On an objection taken by the plaintiff that inasmuch as D did not appeal, he could not have the benefit of it:

*Held*, that as the decree appealed against proceeded on grounds common to all the defendants, and regard being had to the terms of the provisions of s. 544 of the Civil Procedure Code, the Court below was right in allowing the appeal in favour of D also.

*Syed Hussain v. Madan Khan* (1) dissented from. *Sreeram Ghuttuck v. Broje Mohun Ghossal* (2), and *Boydo Nath Surmah v. Ojan Bibee* (3) distinguished.

SECOND APPEAL by the plaintiff, Ram Kamal Shaha.

This appeal arose out of an action brought by the plaintiff to recover possession of certain immoveable property on declaration of title thereto. The allegation of the plaintiff was that the land in dispute belonged to one Mohamed Nachim, deceased (father of defendant No. 10), who sold it to him on the 28th Kartik 1249 B.S. (12th November 1842) for valuable consideration, but his vendor having refused to give up possession after the transfer, he had to bring a suit against the said Mohamed Nachim,

\* Appeal from Appellate Decree No. 1844 of 1899, against the decree of Babu Jogendra Nath Ray, Subordinate Judge of Chittagong, dated the 4th August 1899, reversing the decree of Babu Pankaja Kumar Chatterjee, Munsiff of Satkania, dated the 18th of March 1899.

(1) (1894) I. L. R. 17 Mad. 265. (2) (1869) 11 W. R. 449.

(3) (1869) 11 W. R. 238.

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and obtained a decree; that defendants Nos. 1 and 3 subsequently, under colour of a sham lease from the said Mohamed Nachim, kept him out of possession of the disputed land; that he sued them in ejectment and recovered judgment; and that eventually the defendants combined to dispossess him once again, and actually dispossessed him in the month of Sraban 1257 B.S. (1850). Defendant No. 4 by one written statement and defendants Nos. 6 and 7 jointly by another written statement contended that the suit was bad for multifariousness, inasmuch as they were separately in possession of different parcels of the lands sued for, and want of parties; that it was barred by limitation; that the plaintiff was not a *bona fide* purchaser for valuable consideration; and that the disputed land did not appertain to the taluk of Mohamed Nachim, the vendor of the plaintiff; and that they held the parcels of lands in their respective possession under different titles from third parties.

The Court of First Instance overruled the defendant's objection, and having found that the plaintiff had succeeded in proving his title and possession, and also that of his predecessor in title, decreed the suit. The defendants Nos. 6 and 7 alone preferred an appeal to the lower Appellate Court, which allowed it, finding that the plaintiff had not proved the right which he set up to the land in dispute, or possession by himself or on the part of his predecessor in title.

*Babu Harendra Narayan Mitter* for the appellant.

*Babu Dharendra Lal Khastagir* for the respondent.

**STEVENS AND STEPHEN JJ.** This second appeal arises out of a suit brought by the plaintiff, as the purchaser of a certain *taluka* right, for declaration of title and possession of certain property upon the allegation that he had been dispossessed from that property by all the defendants together. It was alleged that some of those defendants in collusion with the rest had actually ejected the plaintiff by ploughing the land.

The title of the plaintiff was denied, as was the possession of himself and his predecessor in title, and the alleged dispossession.

The suit was defended by three of the defendants only—the 4th the 6th, and the 7th. One written statement was filed by the 4th



defendant, and another by the 6th and 7th defendants. Both sets of defendants objected that the suit was bad for misjoinder. But that objection was overruled by the Court of First Instance on the ground that, according to the case of the plaintiff, the defendants had all combined to dispossess him and that it was evident upon their own case that, as the Munsiff expresses it, they had "laid their heads together to back the plaintiff," by which we presume he meant that they laid their heads together to eject the plaintiff. The Court of First Instance further found in favour of the title and the possession of the plaintiff and his predecessor in title, and against the title set up respectively by the 4th defendant and the defendants Nos. 6 and 7.

The defendants Nos. 6 and 7 alone preferred an appeal to the lower Appellate Court.

The lower Appellate Court allowed the appeal, finding that the plaintiff had not proved the right which he set up to the land in dispute or possession by himself or on the part of his predecessor in title.

Three grounds were taken in arguing this appeal before us. One was, that the learned Judge of the lower Appellate Court had misconceived the case ; secondly, it was urged that the lower Appellate Court ought to have ordered a further investigation. As regards these two points, nothing need be said. The only substantial point is the third, which we proceed to notice ; that is, that as the 6th and 7th defendants alone appealed, being interested under different title from the 4th defendant in separate portions of the land, the appeal ought to have been allowed only as far as they were concerned, and not also in favour of the 4th defendant.

Upon the other side, reference has been made to section 544 of the Code of Civil Procedure, which provides, so far as it is necessary to quote it for the purpose of this case, that where there are more defendants than one in a suit, and the decree appealed against proceeds on any ground common to all the defendants, any one of the defendants may appeal against the whole decree, and thereupon the Appellate Court may reverse or modify the decree in favour of all the defendants.

The question is whether it can be said that the decree appealed against in this case proceeded on any ground common to all the defendants. In this connection, we have been referred

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on the part of the appellant to the case of *Syed Hussain v. Madan Khan*(1), as also to the cases of *Sreeram Ghuttuck v. Brojo Mohun Ghossai*(2) and *Boydo Nath Surmah v. Ojan Bibee*(3). The Madras case is based apparently upon the former case of this Court, to which we have just referred.

With regard to the Madras case, (1), with great respect, we must say that in our opinion the decision seems somewhat to narrow the effect of the provisions of section 554. That section does not require that the decree appealed against should proceed *exclusively* on grounds common to all the defendants, but that it should proceed on any ground common to all the defendants.

The case in page 449 of the 11th volume of the Weekly Reporter was a case of a different kind from that with which we are now dealing; and it seems to us scarcely, upon its own facts, to support the argument which has been adduced for the appellants in a case of the present kind. The case at page 238 of the same volume also, it appears to us, presents some points of difference from the present case, especially this difference, that whereas, as we understand, if the plaintiff's title were found to be proved in the present case, it would stand equally good against all the defendants; in that case the success of one of the defendants depended upon a circumstance which did not arise in the case of the other defendants. It seems to us difficult to say that in the present case the decree appealed against in the lower Appellate Court did not proceed on any ground common to all the defendants, when there are at least two grounds which were common to them all; the first being the title of the plaintiff, which, if it succeeded at all, would succeed equally against them all, and secondly, the ground that they had combined to oust the plaintiff from the land in dispute.

In this view we think that the learned Subordinate Judge was justified in decreeing the whole appeal, with reference to the terms of the provisions of section 544 of the Code of Civil Procedure; and we, therefore, dismiss this appeal with costs.

*Appeal dismissed.*

S. C. G.

(1) (1894) I. L. R. 17 Mad. 265.

(2) (1869) 11 W. R. 449.

(3) (1869) 11 W. R. 233.

## APPELLATE CIVIL.

BANKU BEHARI SHAHA

v.

KRISHTO GOBINDO JOARDAR.\*

1902

Dec. 11.

*Document, execution of—Signature, sufficiency of—Limitation Act (XV of 1877)  
Sch. II, Arts. 91 and 142—Suit to recover possession of immoveable  
property—Cancellation of document not required to be set aside—Fraud.*

A document is a nullity, where the executant of it signed only on the first page, but did not sign on the other pages, having discovered that it was not in accordance with the terms previously agreed upon; such a document does not require to be set aside or cancelled in order to entitle any person to the possession of the property covered by it as against the person in whose favour it stands.

*Thoroughgood's case*(1), *Foster v. Mackinnon*(2), *Sham Lal Mitra v. Amarendra Nath Bose*(3) and *Raghubar Dyal Sahu v. Bhikya Lal Misser*(4) referred to.

A suit to recover possession of immoveable property by setting aside a document on the ground of fraud, but which document does not require to be set aside or cancelled, is governed by Article 142 and not by Article 91, Schedule II of the Limitation Act (XV of 1877).

SECOND APPEAL by Banku Behari Shaha, the defendant No. 1.

This appeal arose out of an action brought by the plaintiffs to recover possession of a share of a certain mouzah with mesne profits, and for a declaration that the pottah by virtue of which the defendant No. 1 had dispossessed them (the plaintiffs) was not executed in the proper way, and void for want of consideration. The allegation of the plaintiffs was that the defendant No. 2, Girija Prosonno Ghose, executed a *mourasi* pottah of his 4-annas

\* Appeal from Appellate Decree No. 809 of 1900, against the decree of G. K. Deb, Esq., District Judge of Nuddea, dated the 17th of April 1900, affirming the decree of Babu Prassanna Coomar Ghose, Subordinate Judge of that district, dated the 3rd of March 1899.

(1) (1584) 2 Co. Rep. 9.

(2) (1869) L. R. 4 C. P. 704.

(3) (1895) I. L. R. 23 Calc. 460.

(4) (1885) I. L. R. 12 Calc. 69.

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share in mouzah Atharkada in favour of defendant No. 1, Banku Behari Shaha, on the 9th Falgoon 1301 B.S. (20th February 1895). But before that pottah was registered he executed a second *mourasi* pottah of the same property in favour of them (the plaintiffs) on the 21st Falgoon of that year, and registered it on the following day. Subsequently the defendant No. 1 got his *pottah* registered under the provisions of s. 35 of the Indian Registration Act. The plaintiffs alleged that they became aware of the defendant's pottah in Joista 1302 B.S. (May, 1895) on account of certain rent-suits having been dismissed which they brought against some tenants of that mouzah on the basis of their subsequent pottah. Hence the present suit was brought. The defence of the defendant No. 1 was that his pottah having been executed for consideration, prior to the pottah of the plaintiffs, his pottah was entitled to a priority over that of the plaintiffs'; and that the plaintiffs having had knowledge of his (the defendant's) pottah, long before three years prior to the institution of the suit, it was barred under Article 91, Schedule II of the Limitation Act.

The Court of First Instance held that Article 91, Schedule II of the Limitation Act, applied to the case, and that the suit was not barred by limitation, because the facts entitling the plaintiffs to have the pottah of defendant No. 1 set aside became known to them within three years before the institution of the suit. On the merits, it found that the pottah of defendant No. 1 was fraudulently obtained, and was not properly executed. The plaintiffs' suit was decreed. On appeal, the District Judge of Nuddea, Mr. G. K. Deb, affirmed the decision of the first Court.

Dec. 2, 3.

*Dr. Ashutosh Mookerjee (Babu Biraj Mohun Mazumdar with him)* for the appellant. As to the question of limitation, I submit that either article 91 or 95 of the Limitation Act applies to this case. In s. 3 of the Limitation Act, it appears that 'plaintiff' includes any person from, or through whom a plaintiff derives his right to sue. [BANERJEE J. The word 'plaintiff' does not occur in article 95.] It occurs in article 91. Plaintiff's suit is barred by limitation. It has been held in the case of *Jugaldas v. Ambashankar* (1) that the circumstance that the plaintiff was in possession through

(1) (1888) I. L. R. 12 Bom. 501.

his tenants could not affect the application of the Act. He would equally be bound to take proceedings to set aside the document within the time limited by the Act. The Privy Council case of *Janki Kunwar v. Ajit Singh*(1) is really applicable. It is not essentially a suit for possession of immoveable property in the sense to which 12 years' limitation is applicable. The immoveable property could not have been recovered until the pottah was set aside, and it was necessary to bring a suit to set that aside. This case falls within article 91 of the Limitation Act (XV of 1877) and is barred.

*Dr. Rash Behary Ghosh (Babu Saroda Charan Mitter with him)* for the respondent. This being a suit for recovery of immoveable property, 12 years' limitation is applicable under article 142 of the Limitation Act. This is no deed at all, there being no complete execution of it, and therefore it need not be set aside. From the evidence in this case it appears that the executant never intended to execute the deed and the mind of the signer did not accompany the signature. Therefore there was no document at all in the way of the plaintiff to be set aside : see Pollock on Contracts (7th Edn.), pp. 461-462, and the case of *The Oriental Bank Corporation v. John Fleming*(2). Unless the deed is operative between the parties, it is not necessary to set it aside : see *Raghubar Dyal Sahu v. Bhikya Lal Misser*(3).

*Dr. Mookerjee* in rep'y.

*Cur. adv. vult.*

**BANNERJEE AND GHOSH JJ.** This appeal arises out of a suit brought by the plaintiffs, respondents, for recovery of possession and mesne profits of a 4-anna-share of a certain mouzah named Fatihpur in *darmaurusi* jote right under a pottah granted to them by defendant No. 2, Girija Prosanno Ghose, on the 21st of Falgoun 1301, and for a declaration that the pottah dated the 9th of Falgoun 1301, by virtue of which defendant No. 1 had dispossessed them, was not executed in the proper way and was void of consideration, and inoperative. The defence of

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(1) (1887) I. L. R. 15 Calc. 58

(2) (1879) I. L. R. 3 Bom. 242 (265).

(3) (1885) I. L. R. 12 Calc. 69.

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defendant No. 1, who alone put in a written statement, was to the effect that the suit was barred by limitation, and that the answering defendant's pottah was valid and operative, and, being of a prior date, should prevail against that of the plaintiffs.

The Courts below have held that though the period of limitation applicable to the suit was not 12 years, but 3 years under Article 91 of Schedule II of the Limitation Act, it was not barred, because the facts entitling the plaintiffs to have the pottah of defendant No. 1 set aside became known to them within three years before the institution of the suit. On the merits they have concurrently found that the pottah of defendant No. 1 had not been properly executed, and was obtained by fraud and without payment of any consideration. And they have accordingly given the plaintiffs a decree.

In second appeal it is contended for the appellant, defendant No. 1, that, upon the facts found as to the plaintiffs' knowledge of the defendant's pottah, the Court of Appeal below ought to have held that the suit was barred under Article 91 of Schedule II of the Limitation Act; while, on the other hand, the learned vakil for the plaintiffs, respondents, in answer to this contention, urges that the suit being one for recovery of possession of immoveable property, and the cancellation of the defendant's pottah being asked for only as subsidiary relief, the period of limitation applicable to the suit is 12 years, and that upon the facts found as to the manner in which the defendant's pottah was signed and came to the hands of defendant No. 1, that document was void *ab initio* and did not require to be set aside.

We are of opinion that the appellant's contention is so far correct that if the period of limitation applicable to the suit is 3 years under Article 91 of Schedule II of the Limitation Act, it is barred according to the finding of the lower Appellate Court to the effect that the plaintiffs knew of the defendant's pottah, and of the reasons why it was inoperative, more than three years before the suit. We are also of opinion that if the immoveable property covered by the defendant's pottah could not be recovered until that document was set aside, and it was necessary to bring a suit to set it aside, the mere fact of the principal relief asked for in this

suit being the recovery of possession of that property could not save it from being barred by limitation. The decision of the Privy Council in the case of *Janki Kunwar v. Ajit Singh*(1) is clear authority on this point, and their Lordships' decision in *Malkarjun v. Narhari*(2) also goes in the same direction.

But we think the facts found by the lower Appellate Court as to the manner in which the pottah propounded by defendant No. 1 came to be signed by the grantor and to pass into the possession of the grantee, clearly show that it was a nullity from its inception and was never intended to be operative: it was not a voidable deed, but was one that was void *ab initio*, and so it did not require to be set aside. The passage of the judgment of the Court of Appeal below in which those facts are to be found runs thus:—

“As to the allegation about the lease to the defendant being a fraudulent transaction, the *onus* of proving it lay on the plaintiffs. The plaintiffs have sought to discharge this *onus* by calling Girija Prasanna Ghose and his gomastha, Ishan Chunder Mozumdar, to prove the circumstances under which the lease to the defendant came to be executed. They both say that the defendant's man, Hari Dobey, acted for the defendant on the occasion; that defendant has agreed to take a lease of Girija Prasanna's share in Fatihpur and Chur Ramnagore on payment of the *salami* and rent referred to above; that a lease was accordingly drafted by Girija Prasanna's man, Inatullah; that afterwards the draft was taken to the outcherry of defendant's master, Srikanta Shaha, by Hari Dobey for being fair copied; that when the fair copy was brought it was signed on the first page by Girija Prasanna, and that at that time Ishan Chandra Mozumdar having turned up, he was asked by Girija Prasanna, whose eyesight was defective, to read it, and that when it was discovered that it was not in accordance with the terms previously agreed to, Girija Prasanna refused to sign the other pages and asked Ishan Mozumdar to keep it. It was then that Hari Dobey took it away on pretence of rectifying the omission, but he afterwards refused to return unless the money spent on stamps, &c., was paid to him. The Subordinate Judge has believed this evidence and found

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(1) (1887) I. L. R. 15 Calc. 58.

(2) (1900) I. L. R. 25 Bom. 337; L. R. 27 J. A. 216.

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as a fact that the lease to the defendant was obtained by fraud." And later on, in the judgment this finding is affirmed by the lower Appellate Court. This shows that the signature of the grantor on the defendant's pottah is, to use the language of Byles J. in *Foster v. Mackinnon*(1), "invalid not merely on the ground of fraud, but on the ground that the mind of the signor did not accompany the signature; in other words, he never intended to sign, and therefore in contemplation of law never did sign the contract to which his name is appended."

*Thoroughgood's* case(2), the case of *Foster v. Mackinnon*(1) just referred to, and other cases to which reference is made in Pollock on Contracts, 5th edition, pages 441-45, are authorities for the view we take that the pottah of defendant No. 1 must be treated as a nullity from the beginning, as a document which never had been executed in the true sense of the term, and as not requiring therefore to be set aside. That a document which was never intended by the executant to be operative does not require to be set aside or cancelled in order to entitle any person to the possession of the property covered by it as against the person in whose favour it stands, has been held by this Court in the cases of *Sham Lall Mitra v. Amarendra Nath Bose*(3) and *Raghubar Dyal Sahu v. Bhikya Lal Misser*(4).

It was argued for the appellant that as the lower Appellate Court has found that "the plaintiffs could not recover possession of the property leased out to them until the prior lease in favour of the defendant was set aside," it is not open to this Court in second appeal to set aside that finding and take a different view of the defendant's lease. We do not feel pressed by this argument at all. If the so-called finding had been a finding of fact, no doubt we could not interfere with it. But it is clearly no finding of fact. It is only an inference of law deduced from the facts found, from which we have shown above the very opposite inference arises, namely, that the lease in favour of defendant No. 1 was a nullity from the beginning and did not require to be set aside.

(1) (1869) L. R. 4 C. P. 704, 711.

(2) (1584) 2 Co. Rep. 9.

(3) (1895) I. L. R. 23 Calc. 460.

(4) (1885) I. L. R. 12 Calc. 89.



For the foregoing reasons we must hold that this suit, so far as it seeks for recovery of possession of immoveable property, is not barred by limitation, the prior pottah propounded by the defendant No. 1 being void *ab initio*, and that this appeal should be dismissed with costs, the declaration by the Courts below that, that pottah is inoperative being treated merely as a finding auxiliary to the granting of the decree for possession.

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S. C. G.

*Appeal dismissed.*

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 July 2.

LAKSHMI PRIYA CHOWDHURANI

v.

RAMA KANTA SHAHA.*

Limitation—Limitation Act (XV of 1877), Sch. II, Art. 29—Suit for money wrongly taken out in execution—Regulation VIII of 1819—Putnee taluk.

A suit to recover the surplus proceeds of a sale held under Regulation VIII of 1819, wrongfully taken out by the defendant in execution of a decree against a third party, does not come under Art. 29, Sch. II, of the Limitation Act.

Jaggivan Jachherdas v. Gulam Jilani Chaudhri (1) dissented from.

APPEAL by the defendant, Lakshmi Priya Chowdhurani.

The plaintiffs were owners of 12 annas and odd gandas, and Ram Sundar Shaha, the ancestors of defendants Nos. 8, 9 and 10 and the defendant No. 11 were the owners of the remaining 3 annas and odd gandas share of a certain putnee taluk. On the 26th May 1893, the plaintiffs purchased the said 3 annas and odd gandas of the taluk from the defendants Nos. 3 to 7, who had purchased the same at an auction sale on the 16th March 1891. Thus the plaintiffs became owners of the entire taluk. The taluk was then put up to sale for arrears of rent under Regulation VIII of 1819, and purchased by the defendant No. 6 for Rs. 10,250. After deduction of the rent due, etc., Rs. 9,050-9-6 stood in deposit in the Noakhali Collectorate. In execution of a decree obtained by the defendant No. 1 against Ram Sundar Shaha and the defendant No. 11, the defendant No. 1 caused Rs. 1,862-6-6 out of the said sale-proceeds to be attached on the 18th January 1896, and took out the said amount on the 17th February following. Out of the aforesaid amount, the defendant No. 12 realised from the defendant No. 1 Rs. 1,232-6-0, leaving a balance of Rs. 630-0-6 with the latter defendant.

The present suit was instituted by the plaintiffs for the recovery from the defendant No. 1 of the aforesaid sum of Rs. 630-0-6 with interest. The suit was instituted on the 6th May 1898. One of the issues framed was whether the suit was

* Appeal from Original Decree No. 341 of 1898, against the Decree of S. N. Huda, Esquire, Officiating District Judge of Noakhali, dated the 15th of August 1898.

(1) (1883) I. L. R. 8 Bom. 17.

barred by limitation. It was contended on behalf of the defendant No. 1 that the suit was barred by Article 29 of the Limitation Act. The District Judge held that Article 62 of the Limitation Act was applicable to the present suit, and that accordingly it was not barred. On the merits the suit was decreed.

Babus Basanta Kumar Bose and Girija Prasanna Roy for the appellant.

Babu Baikanta Nath Das for the respondents.

GROSE AND GRIND JJ. The only question raised in this appeal on behalf of the defendant is one of limitation. It appears that a certain putnee taluk belonged to one Ram Sundar and some other persons. They sold it to the plaintiffs, and while the putnee was in the hands of the plaintiffs it was sold for rent in 1895 under the provisions of Regulation VIII of 1819, the result being that after payment of the rent due to the zamindar, a certain amount of money was left in the hands of the Collector to the credit of the owner of the putnee. Subsequent thereto, the present defendant in execution of a decree that he had against the said Ram Sundar attached the surplus sale-proceeds, the attachment being taken out on the 18th of January 1896; and the money thus attached was withdrawn by the defendant on the 17th of February 1896. Thereupon, the present suit was instituted on the 6th of May 1898 for recovery of the money in question from the defendant, upon the ground that the plaintiff was the rightful owner of the putnee, and not Ram Sundar, upon the date when the sale took place, and therefore the defendant had no right to withdraw the surplus sale-proceeds.

The Court below has decreed the plaintiff's suit.

The ground that has been urged on behalf of the defendant by the learned Vakil is that the case is governed by Article 29 of the Second Schedule of the Indian Limitation Act, and that the suit not having been brought within one year from the date when the attachment was taken out by the defendant, it is barred by limitation. Article 29 of the Second Schedule runs thus:

“For compensation for wrongful seizure of moveable property under legal process, one year (from) the date of the seizure.”

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The article contemplates wrongful seizure, the seizure of moveable property under legal process, and that by reason of such wrongful seizure a person has been damnified. The plaintiffs in the present case do not say that they have sustained any injury by reason of the attachment, nor do they claim any compensation on that account. What they say is that the money taken by the defendant rightfully belongs to them, and they therefore seek to recover it as having been wrongfully taken from the Collectorate.

It seems to us that Article 29 referred to by the learned Vakil contemplates a very different class of cases from the case with which we are concerned. He has, however, called our attention to the case of *Jagjivan Javherdas v. Gulam Jilani Chaudhri* (1), but we regret we are unable to follow it. The result is that the appeal is dismissed with costs.

Appeal dismissed.

M. N. R.

(1) (1888) I. L. R. 8 Bom. 17.

CRIMINAL REVISION.

SUKRU DOSADH

v.

RAM PERGASH SINGH.*

1902

July 10.

Jurisdiction—Criminal Procedure Code (Act V of 1898) ss. 107, 145—Proceedings under s. 145 of the Code, initiation of—Security for keeping the peace.

The making of a formal order under sub-section (1) of s. 145 of the Criminal Procedure Code is absolutely necessary to give the Magistrate jurisdiction to initiate proceedings under that section.

Where a notice was issued on the parties under s. 107 of the Criminal Procedure Code to show cause why they should not execute a bond to keep the peace; and the Magistrate at the hearing recorded an order wherein he stated that it appeared to him that, on the facts, the case was one for the application of s. 145 of the Code, and not of s. 107, and he then proceeded to "bind down" the first party under sub-section (6) of s. 145:

Held, that the expression "bind down" was not correct, and that the order was entirely bad.

RULE granted to the petitioners, Sukru Dosadh and others.

This was a Rule calling upon the District Magistrate of Patna to show cause why an order purporting to have been made under sub-section (6) of s. 145 of the Criminal Procedure Code should not be set aside on the ground that such order was made without jurisdiction, inasmuch as no preliminary order had been passed under the provisions of sub-section (1) of s. 145.

In this case a notice under s. 107 of the Criminal Procedure Code was issued on the parties to show cause why they should not execute a bond to keep the peace for one year.

When the case came on for hearing, the Subdivisional Magistrate of Barh recorded the following order:—

"It appears to me quite obvious that, on the facts, the case is one for the application of s. 145 and not s. 107 of the Criminal Procedure Code..... in the absence of direct proof that the first party has been unlawfully evicted from possession during the two preceding months, I feel bound to bind down the first party under sub-section (6), s. 145 of the Criminal Procedure Code."

* Criminal Revision No. 390 of 1902, against the order passed by V. C. Ramsay Esq. Subdivisional Officer of Barh, dated the 30th of January 1902.

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*Babu Atulya Charan Bose* for the petitioners. Both sides in this case were called upon under s. 107 to show cause why they should not execute a bond to keep the peace. After the matter was heard out, the Magistrate came to the conclusion that s. 107 did not apply, but that s. 145 did, and he proceeded to bind down the first party under sub-section (6). It has been repeatedly held that before a Magistrate has jurisdiction to initiate proceedings under s. 145 he must make a formal order under sub-section (1) of that section. No such order has been made in these proceedings. The Magistrate has no power to bind any one down under sub-section (6). The Magistrate has converted a proceeding commenced under s. 107 into one under s. 145, and this he has no right to do. The order is therefore bad, and without jurisdiction.

*Babu Jogesh Chunder Dey* for the opposite party. The Magistrate acted on information when he called upon the parties to show cause under s. 107 of the Criminal Procedure Code, just as he would have done, if he had wished to draw up proceedings under s. 145. Although the Magistrate did not make a formal order under sub-section (1) of s. 145, the notice calling upon the parties to show cause under s. 107 may be read in place of that formal order. The making or not of a formal order under sub-section (1) of s. 145 is, I submit, a question of procedure, and does not in any way affect the jurisdiction of the Magistrate.

**STEVENS AND MITRA JJ.** The Rule in this case was issued to show cause why an order purporting to have been made under sub-section (6) of section 145 of the Code of Criminal Procedure should not be set aside on the ground that such order was made without jurisdiction, inasmuch as no preliminary order had been passed under the provisions of sub-section (1) of section 145.

It is quite clear to us that this Rule must be made absolute. There is a long current of decisions of this Court to the effect that the making of a formal order under sub-section (1) of section 145 is absolutely necessary to give the Magistrate jurisdiction to initiate proceedings under that section. In the present case a notice was issued on the parties under section 107 of the Code of Criminal Procedure to show cause why they should not execute a

bond to keep the peace for one year. When the case came on for hearing, the Subdivisional Officer recorded an order, in the course of which he stated that it appeared to him quite obvious that, on the facts, the case was one for the application of section 145 of the Code of Criminal Procedure, and not of section 107. He thereupon proceeded at once to do what he called "bind down" the first party under sub-section (6) of section 145. The expression of course was not correct, and, what is of more importance, the order itself was entirely bad.

The Rule is therefore made absolute, and the order made by the Subdivisional Officer on the 30th January 1902 is set aside.

*Rule made absolute.*

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SINGH.

## ORIGINAL CIVIL.

1903  
 Feb. 18.

BHUPATI RAM

v.

SOURENDRA MOHUN TAGORE.\*

*Interest—Agreement to pay interest—Evidence, admissibility of—Promissory note  
 —Civil Procedure Code (Act XIV of 1882), Chapter XXXIX, s. 532.*

In a suit instituted under Chapter XXXIX of the Civil Procedure Code (Act XIV of 1882) the plaintiff is not entitled to recover any interest unless such interest is specified in the promissory note itself, or to give evidence regarding any agreement to pay interest.

*Remfry v. Shillingford*(1) referred to.

## ORIGINAL SUIT.

This suit was instituted under Chapter XXXIX of the Civil Procedure Code to recover from the defendant, Rajah Sir Sourendra Mohun Tagore, a certain sum due on a promissory note. There was no interest specified in the note, but the plaintiff alleged that there was an agreement, apart from the note, to pay interest, and mentioned in the summons a sum due for interest, calculating it on the basis of the agreement.

*Mr. N. Chatterjee* for the plaintiff. The explanation added to s. 532 of the Code entitles the plaintiff to give evidence of the separate agreement to pay interest. In *Remfry v. Shillingford*(1) PHEAR J. held that Act V of 1866 was intended only to apply to those cases in which the bill itself, together with mere lapse of time, was sufficient to establish for the plaintiff a *prima facie* right, and the learned Judge therefore excluded the evidence that was offered to be given. To obviate the difficulty felt by that learned Judge, the explanation to s. 532 was added, by which the procedure under Chapter XXXIX of the Code has been extended to cases other than those in which the bill, hundi

\* Original Civil Suit No. 863 of 1902.

(1) (1876) I. L. R. 1 Calc. 180.



or note sued upon, together with mere lapse of time, is sufficient to establish a *prima facie* right to recover.

The defendant did not apply for leave to enter appearance.

**AMRER ALI J.** This suit is under Chapter XXXIX of the Civil Procedure Code, which lays down a certain procedure entitling the plaintiff to obtain a decree without going into evidence. The form of the summons is prescribed in schedule 4, form 172. Section 532 prescribes that when the procedure under Chapter XXXIX is adopted, and a summons is taken out in accordance with the form given in the schedule, the defendant shall not be entitled to appear without leave, and if he has not obtained such leave or does not appear to defend pursuant to such leave, the plaintiff shall be entitled to a decree for any such sum not exceeding the sum mentioned in the summons, together with interest at the rate specified (if any) to the date of decree.

In the case before me no interest is specified in the note, but the plaintiff in his plaint claims interest under an agreement said to have been entered into apart from the note, and has chosen to calculate the interest on that basis and to insert it in the summons. When the case came on before me on the 9th February I pointed out to learned counsel that under section 532 the interest must be specified in the note. He contended on the authority of *Remfry v. Shillingford* (1) and the explanation attached to section 532 that he was entitled to give evidence regarding the agreement as to interest. I am of opinion that this position is wholly untenable; in fact, the case just referred to is entirely against the proposition. In that case the promissory note was payable by instalments, and contained a stipulation that in default in payment of the first instalment the whole amount was to become due. A suit was brought thereupon under the Bills of Exchange Act V of 1866, the provisions of which for the purposes of this case may be taken as *pari materia* with the provisions of section 532, and the Judge there held that no such suit could be brought under Act V of 1866. In the beginning of his judgment Mr. Justice Phear said as follows: "I think the Act was only intended to apply to those cases in which the bill itself, together with mere lapse of time,

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(1) (1876) I. L. R. 1 Cal. 130.

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 MOHUN  
 TAGORE.

is sufficient to establish for the plaintiff a *prima facie* right to recover." Anybody who was conversant with the language of Statutes would put the same construction on the provisions of Act V of 1866, and would put the same construction upon the provisions of section 532. But the Legislature did not apparently understand what Mr. Justice Phear was aiming at, and apparently not understanding the meaning of the language, inserted the explanation, which, so far as I am able to construe, conveys absolutely no meaning. The object apparently of the draughtsman was to negative what Mr. Justice Phear had stated, and with that object the explanation was put in, which seemingly contradicts Mr. Justice Phear's *dictum*, and goes no further. It does not explain what class of cases the section applies to. It only says: "This section is not confined to cases in which the bill, hundi, or note sued upon, together with mere lapse of time, is sufficient to establish a *prima facie* right to recover." As it stands, speaking with all respect, it is wholly unintelligible and meaningless, and stultifies the substantive provisions of the section.

In my opinion the plaintiff is not entitled to recover interest on this action, no interest having been specified in the note.

Mr. Chatterjee, on behalf of the plaintiff, has applied that, that being my opinion, he might be allowed to proceed under Chapter V of the Code. That course was ordered by Mr. Justice Phear in the case referred to, and I propose to allow the plaintiff to adopt that course, and I will give him the summons under Chapter V. The order will be drawn up in the same way as in that case.

Attorney for the plaintiff: *J.C. Dutt.*

S. C. B.

## CRIMINAL REVISION.

RADHABULLAV ROY

v.

BENODE BEHARI CHATTERJEE.\*

1902

July 10.

*Jurisdiction—Transfer of criminal case to Subordinate Magistrate—District Magistrate, power of, to pass order relating to case not on his own file—Criminal Procedure Code (Act V of 1898) ss. 190, 192, 435.*

When a case is once made over for disposal to a Subordinate Magistrate by the District Magistrate, the latter is not competent to pass any order relating to it other than an order such as might be made by him under Chapter XXXII of the Code of Criminal Procedure.

*Moul Singh v. Mahabir Singh* (1) and *Golapdy Sheikh v. Queen-Empress* (2) referred to.

RULE granted to the petitioners, Radhabullav Roy Chowdhuri and another.

This was a Rule calling upon the District Magistrate of Maldah to show cause why the order made on the 5th April 1902 directing the prosecution of the petitioners should not be set aside, on the ground that the order was one which was not within his jurisdiction to make.

On the 18th December 1901 the complainant, Benode Behari Chatterjee, lodged a complaint before the senior Deputy Magistrate of Maldah who was in charge of the station, during the absence of the District Magistrate, charging the petitioners and one Panchanand Das with an offence punishable under s. 504 of the Penal Code. The senior Deputy Magistrate made the complaint over to another Deputy Magistrate for inquiry and report; that Deputy Magistrate, after inquiry, reported that there was no case except against Panchanand Das.

On the 22nd January 1902 the District Magistrate, who had then returned to the station, ordered that Panchanand Das should be summoned under s. 504 of the Penal Code, and

\* Criminal Revision No. 442 of 1902.

(1) (1899) 4 C. W. N. 242.

(2) (1900) I. L. R. 27 Calc. 979.

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 BHABRI  
 CHATTERJEE.

on the 4th February, he made over the case for disposal to a Deputy Magistrate who tried and convicted Panchanand Das. Thereupon the complainant applied to the trying Deputy Magistrate that the other persons named in his complaint might be summoned before the Court and tried. That application was rejected by the Deputy Magistrate on the 20th March 1902. The case was then called for by the District Magistrate under s. 435 of the Criminal Procedure Code, who on the 5th April recorded the following order:—

"I now order the prosecution of the Police Sub-Inspector, Sashi Chowdhuri, and Sub-Manager, Radhabullav Roy Chowdhuri, under section 504 of the Indian Penal Code."

*Babu Joy Gopal Ghosh* for the petitioners. In the first instance there was a complaint against Panchanand and the petitioners. The District Magistrate ordered Panchanand only to be prosecuted, and made the case over to a Deputy Magistrate who tried and convicted him. The complainant, thereupon, asked the Deputy Magistrate to summon and try the petitioners. This, however, he declined to do. The District Magistrate, purporting to act under s. 435 of the Criminal Procedure Code, called for the case and ordered the prosecution of the petitioners. This he could not do, and the order is illegal. Under s. 435 the District Magistrate can only call for a case and refer it to a higher tribunal: he has no power to order a prosecution. If the District Magistrate wished to deal with the case himself, he should have withdrawn it to his own file under s. 528 of the Code, but this he has not done: see *Moul Singh v. Mahabir Singh*(1) and *Golapdy Sheikh v. Queen-Empress*(2).

**STEVENS AND MITRA JJ.** This Rule was issued calling upon the District Magistrate to show cause why the order made on the 5th of April last directing the prosecution of the petitioners should not be set aside on the ground that the order was one which was not within his jurisdiction to make.

The circumstances of the case are as follows. On the 18th December 1901, a complaint was made against the petitioners and against one Panchanand Das, charging them with

(1) (1899) 4 C. W. N. 242.

(2) (1900) I. L. R. 27 Calc. 979.

an offence punishable under section 504 of the Indian Penal Code. The complaint was made to the senior Deputy Magistrate in charge, in the absence of the District Magistrate from the station. The senior Deputy Magistrate made the complaint over to another Deputy Magistrate for careful inquiry and report. The second Deputy Magistrate, after inquiry, reported that there was no case except against Puchanand Das. The District Magistrate had evidently returned to the station, for the next two orders made in the case were by him. The first of these, namely, that of the 22nd January 1902, was that Puchanand should be summoned under section 504 of the Indian Penal Code. The second was dated the 4th February, and made the case over to a third Deputy Magistrate for disposal. The case was then tried by the last-named Deputy Magistrate as against Puchanand Das and ended in the conviction of that person. Thereupon, the complainant applied to the trying Deputy Magistrate that the other persons named in his complaint might be brought before the Court and tried also; but the application was rejected by the Deputy Magistrate on the 20th of March 1902. The District Magistrate afterwards called for the case, as he says, under the provisions of section 435 of the Code of Criminal Procedure. After referring to the record and making certain criticism on the judgment of the Deputy Magistrate who had tried the case, he recorded the following order on the 5th of April 1902 :—

"I now order the prosecution of the Police Sub-Inspector, Soshi Chowdhuri, and Sub-Manager, Radhabullav Roy Chowdhuri, under section 504 of the Indian Penal Code."

It is this last order with which we are now concerned. It has been urged before us on the part of the petitioners that the Magistrate acted without jurisdiction, inasmuch as there was no case before him in which he could pass the order in question. The District Magistrate has submitted in his explanation that the case was before him, inasmuch as he had taken it upon his file on the 22nd of January, and he submits that the order now in question was but a supplementary order to that which he made on that date for the summoning of Puchanand Das.

We think that when once the District Magistrate made the case over for disposal to the Deputy Magistrate, it was out of his

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hands and he was not competent to pass any order relating to it other than an order such as might have been made by him under Chapter XXXII of the Code. That the case was not in fact upon his own file was indicated by his own action in sending for the record, as he says, under section 435.

We may refer to the case of *Moul Singh v. Mahabir Singh* (1) and the case of *Golapdy Sheikh v. Queen-Empress* (2) of the same volume as having some bearing on the present case.

We think that the order of the District Magistrate cannot stand, and we therefore make this Rule absolute, and set it aside.

We may mention that we have just set aside the conviction in the case of Panchanand Das on the ground that the facts proved do not constitute an offence punishable under section 504 of the Indian Penal Code.

D. S.

(1) (1899) 4. C. W. N. 242.

(2) (1900) I. L. R. 27 Calc. 979.

## APPELLATE CIVIL.

FAZLUR RAHIM ABU AHMED

v.

DWARKA NATH CHOWDHRY.\*

1908

Feb. 18,  
March 4.

*Jurisdiction—Munsiff, jurisdiction of—Rent, suit for—Bengal Tenancy Act (VIII of 1885) s. 144—Civil Procedure Code (Act XIV of 1882) ss. 15 and 17—Civil Courts Act (XII of 1887) s. 19—Cause of action—Pecuniary limitation—Second appeal.*

Section 144 of the Bengal Tenancy Act is controlled by ss. 15 and 17 of the Civil Procedure Code; a suit for rent is therefore to be instituted, subject to pecuniary limitations, in the Court of the lowest grade competent to try it.

SECOND APPEAL by the plaintiff, Fazlur Rahim Abu Ahmed.

This appeal arose out of an action for arrears of rent due on a putni tenure for the years 1303—1306 B.S. The allegation of the plaintiff was that his father was in possession of the putni taluq as a registered proprietor and as *Matwalli* of the *waqf* property of one Kiamunissa Bibi. On the death of his father in 1303 B.S. the plaintiff became the registered proprietor as *Matwalli* in place of his deceased father. The rent claimed was under one thousand rupees, but the tenure in connection with which the suit was brought was admittedly of the value of Rs 4,500, and was within the local limits of the jurisdiction of the Munsiff of Kandi and of the Subordinate Judge of the district of Murshidabad. The defendants were residents within the local limits of the jurisdiction of the Munsiff of Singapore, but the suit was instituted in the Court of the Munsiff of Kandi on the ground that the cause of action arose within the local limits of his jurisdiction. The defendants contended, *inter alia*, that under s. 144 of the Bengal Tenancy Act, the Court had no jurisdiction to entertain the suit; and that the plaintiff was not entitled to the rents claimed. The

\* Appeal from Order No. 211 of 1901, against the order of W. Teunon, Esq., District Judge of Murshidabad, dated the 3rd April 1901.

*Appellate Bench:* Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Sale and Mr. Justice Stevens.

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learned Munsiff having overruled the objections of the defendants, decreed the plaintiff's suit. On appeal, the District Judge of Murshidabad, Mr. W. Teunon, held that, having reference to s. 144 of the Bengal Tenancy Act, the cause of action in rent suits must be deemed to have arisen within the local limits of the Civil Court which would have jurisdiction to entertain a suit for the possession of the tenure; and in this case the cause of action must be deemed to have arisen within the local limits of the jurisdiction of the Subordinate Judge. The learned District Judge accordingly decreed the appeal, and directed the plaint to be returned to the plaintiff for presentation in the proper Court.

*Babu Saroda Churn Mitter*, for the respondent, took a preliminary objection as to the form of the appeal. He contended that the appeal was presented as an appeal from an order, with a court-fee of Rs. 2, but it should have been presented as an appeal from a decree and full court-fees ought to have been paid. It is a decree under s. 2 of the Civil Procedure Code, and not an order under s. 588, cl. (6). This clause applies to an order passed by the Court of first instance, and not to an order made in appeal: see *Bindeshri Chaubey v. Nandu*(1).

*Dr. Ashutosh Mookerjee*, for the appellant, relied upon the case of *Goor Bux Sahoo v. Birj Lal Benka*(2), which supported his contention that the order appealed against was an order, and not a decree, and it was appealable under s. 589 of the Code of Civil Procedure.

The question to be decided in this appeal is as to the jurisdiction of a Court to try a suit for rent. It depends upon the construction of s. 144 of the Bengal Tenancy Act. This section refers merely to local, and not to pecuniary, jurisdiction. It ought to be read with s. 17 of the Civil Procedure Code, which refers by implication to s. 15 of the Code. See also ss. 18 and 19 of the Civil Courts Act (XII of 1887). But for s. 15 of the Civil Procedure Code, under s. 18 of the Civil Courts Act, a Subordinate Judge and also a Munsiff would have concurrent jurisdiction over the subject-matter of the suit. Section 144, cl. (1) of the Bengal Tenancy Act does not in any

(1) (1881) I. L. R. 3 All. 456.

(2) (1899) I. L. R. 26 Calc. 275.



way affect the provisions of the Civil Courts Act. In ss. 16 and 17 of the Civil Procedure Code the pecuniary limits and local limits are kept apart.

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*Babu Saroda Churn Mitter* for the respondent. Chapter XIII of the Bengal Tenancy Act deals with judicial procedure, and cl. (2) of s. 143, which is in Chapter XIII of the Act, makes the Civil Procedure Code applicable to suits between landlord and tenant. Then comes s. 144, which says that for the purposes of the Civil Procedure Code, cause of action in all suits between landlord and tenant as such shall be deemed to have arisen within the local limits of the jurisdiction of the Civil Court which would have jurisdiction to entertain a suit for the possession of the tenure or holding in connection with which the suit is brought. Section 144 became necessary to be inserted, as ss. 16 and 17 of the Civil Procedure Code do not expressly deal with suits for recovery of rent. The words "subject to limitations aforesaid" in s. 17 of the Civil Procedure Code do not refer to s. 15, but to s. 16 of the Code, and subject to pecuniary limitations prescribed by any law.

A suit for rent is no doubt upon a contract, and as such it would come within the local limits of the Court within the jurisdiction of which the contract was made, but in s. 144 of the Bengal Tenancy Act a limitation is given, i. e., the residence of the defendant should not be taken into consideration, but only the cause of action should be taken into consideration. The cause of action and local limits in s. 144 of the Bengal Tenancy Act have reference to s. 17 of the Civil Procedure Code. Sub-section 2 of s. 144 supports my contention. It would seem, reading the two sub-sections, that all suits and application by landlord and tenant must be decided by one Court, and that Court being one which has jurisdiction to decide suits for recovery of possession. Section 144 does not refer to pecuniary jurisdiction, but only to local jurisdiction. Sections 17 and 18 of the Civil Courts Act (XII of 1887) deal with pecuniary jurisdiction of Courts. Competency to try a suit depends upon local as well as pecuniary jurisdiction, and the question of pecuniary jurisdiction would arise after the question of local jurisdiction has been decided. Section 15 of the Civil Procedure

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Code would not limit the operation of s. 144 of the Bengal Tenancy Act. Section 15 has no application where there is only one Court.

*Dr. Ashutosh Mookerjee* in reply.

*Cur. adv. vult.*

**MAOLHAN C. J.** The question we have to decide is whether the Munsiff had jurisdiction to entertain the present suit. A preliminary objection has been taken to the competency of this appeal, but in my opinion an appeal lies : see *Goor Bux Sahoo v. Birj Lal Benka* (1).

Upon the question of jurisdiction, the suit was for rent due on a putni tenure for a sum under Rs. 1,000, but the capital value of the tenure was over that sum—about Rs. 4,500. The sum sued for is within the pecuniary limits of the Munsiff's jurisdiction, but the Subordinate Judge's Court would be the one to entertain a suit for the possession of the tenure.

The Court below held that the Munsiff had no jurisdiction and returned the plaint. The plaintiff appeals.

The question appears to me to turn on the true construction of section 144 of the Bengal Tenancy Act, and sections 15 and 17 of the Code of Civil Procedure. The Court below has not referred to the latter sections.

Section 144 lays down where the cause of action in suits between landlord and tenant shall "*for the purposes of the Code of Civil Procedure*" be deemed to have arisen: it does not say in which Court the suit is to be instituted. To ascertain this we must go to section 17 of the Code of Civil Procedure. Section 16 does not apply. Section 17 says that "all other suits," that is, other than those mentioned in section 16, "shall be instituted in a Court within the local limits of whose jurisdiction the cause of action arises." This in the case of suits between landlord and tenant is controlled by section 144 of the Tenancy Act, which tells us where in such suits the cause of action shall be deemed to have arisen, *viz.*, "within the local limits of the jurisdiction of the Civil Court which would have jurisdiction to entertain a suit for the possession of the tenure or holding in connection with which the suit is brought."

(1) (1899) I. L. R. 26 Calc. 275.

If the matter rested there, the point would be reasonably clear. But the provision in section 17 is made expressly "subject to the limitations aforesaid," which, looking at section 16, must include a pecuniary limitation, and under section 15 of the Code, "every suit *shall* be instituted in the Court of the lowest grade competent to try it." It must mean the particular suit then before the Court.

Under section 19 of the Civil Courts Act (XII of 1887) the Munsiff has jurisdiction to try cases up to a pecuniary limit of Rs. 1,000. The present suit is for a sum under that amount, and consequently the Munsiff would have jurisdiction to deal with the case unless section 144 of the Tenancy Act be a bar. The cause of action arose in the case within the local limits of the Munsiff's Court. There is no reported case where any contention such as that of the present defendants has ever been raised, and there must have been many cases in which Munsiffs have dealt with cases similar in their circumstances to the present.

We cannot deal with the case as one depending upon section 144 of the Tenancy Act alone: we must read that section with the sections of the Code to which I have referred, seeing that section 144 in laying down where the cause of action shall be deemed to have arisen states that it is for the purposes of the Code of Civil Procedure.

Looking at all the sections to which I have referred, I think they may fairly bear the construction, that the Munsiff had jurisdiction to try the present case.

The appeal therefore must be allowed and the case remanded to be tried on the merits. The costs of this appeal will abide the result.

**SALA J.** I agree.

**STEVENS J.** I agree.

*Appeal allowed, case remanded.*

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## SMALL CAUSE COURT REFERENCE.

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Feb. 11.

GARLING

v.

SECRETARY OF STATE FOR INDIA.\*

*Reference—Presidency Small Cause Courts Act (XV of 1882) s. 69—Conditions imposed upon Judge of Small Cause Court in stating case for opinion—Civil Procedure Code Act (XIV of 1882) ss. 617 and 621—High Court, power of—Amendment—Remand.*

Before the High Court can give an opinion upon a matter referred to it by the Presidency Small Cause Court under s. 69, three conditions must be complied with:—(1) that the Court referring the matter entertains a reasonable doubt upon some question of law, (2) that it states what the point is upon which the doubt is entertained, and (3) that it gives a statement of the facts containing an expression of opinion on the point which is referred to the decision of the High Court.

When such a course has not been adopted, the High Court can, under s. 621 of the Code of Civil Procedure, return the case to the Lower Court for amendment.

### SMALL CAUSE COURT REFERENCE.

THIS was a reference made by Mr. E. W. Ormond, the Second Judge of the Court of Small Causes, Calcutta, under s. 69 of the Presidency Small Cause Courts Act, 1882, and s. 617 of the Code of Civil Procedure.

The plaintiff, Mrs. J. S. Garling, instituted a suit in the Small Cause Court against the Secretary of State for India in Council to recover the sum of Rs. 1,500 (the equivalent of £100), being the value of a bowl and the amount for which it was insured, and which was found to be broken on being opened at the General Post Office, Calcutta. On the 26th November 1902, the learned Judge decreed the suit for Rs. 1,500 in favour of the plaintiff, but, at the request of the defendant's attorney, made his judgment contingent upon the opinion of the High Court.

The case, as stated by the learned Judge for the opinion of the High Court, was as follows:—

"The question that I have to refer for opinion is whether, in the circumstances stated below, the defendant is liable for the breakage of a bowl sent as an insured

\* Small Cause Court Reference No. 5 of 1902.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Sale and Mr. Justice Stevens.

parcel by post from England to Calcutta. The following is my judgment in the case:—

The plaintiff, who was the owner of a valuable onyx bowl she had left in England, requested a friend to insure it and send it out to Calcutta to her. The bowl was sent out by post as a parcel insured for £100 to destination, and packed in a wooden box. The plaintiff called for the parcel at the Calcutta General Post Office, and at the suggestion of the postal authorities the box was opened by one of their servants. The bowl was found to be broken, and is now practically valueless. The plaintiff now sues to recover from the Secretary of State for India in Council, Rs. 1,500, the equivalent of £100, being the value of the bowl and the amount for which it was insured, and Rs. 78-8 for costs and charges paid by her as customs duty.

The defendant's attorney contends that the contract was made with the Postmaster-General in England and not with the Indian Post Office, and therefore the defendant is not liable; that the breakage is due to the bad packing; and that the value placed upon the bowl is excessive.

The Indian Post Office, in the Indian Postal Guide, undertakes, except in certain cases, to grant compensation not exceeding the insured value for the loss of, or damage to, an insured parcel sent by post from England to India. Section IV, that is, cls. 216 to 248 of the Guide, contains the rules relating to Foreign Parcel Post, and cl. 216 shows that a parcel received in India by post from the United Kingdom comes under those rules. Cls. 229 to 240 relate to compensation payable by the Indian Post Office in respect of insured parcels by Foreign Parcel Post, and cl. 237 governs the present case and is as follows:—

'In the case of complete insurance to destination, compensation not exceeding the insured value will be granted to the sender, or in default, or at the request of the sender, to the addressee of an insured parcel for any actual loss or damage occurring during transit, except in the cases described below. The sender of a lost parcel is also entitled to a return of the postage paid, but in no case is the insurance fee refunded.

The excepted cases are as follows:—

- (a) When the loss or damage has been caused by the fault or negligence of the sender or arises from the nature of the article.
- (b) Fraudulent insurance for a sum above the real value of the contents, or any other fraud on the part of the sender or addressee.
- (c) When the insured article has been delivered to the addressee, and he has signed and returned the receipt for such article.
- (d) When the sender or addressee does not give intimation of loss or damage within twelve months from the date of posting.
- (e) In case of loss or damage due to improper or insecure packing.
- (f) When there is no visible damage to the cover or seals.
- (g) In cases beyond control.'

This clause was not referred to by either side, but the question of packing was gone into. The bowl is 12 inches × 10 inches, and was broken at the end. There was about  $\frac{1}{8}$ th of an inch between the ends of the bowl and the box where the wood is half an inch thick. The evidence for the plaintiff shows that the bowl was not broken when packed, and that it was surrounded with a packing of

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wadding, etc. The defendant's witness, Mr. Davies of Messrs. Hamilton and Company, thinks that the packing at the end must have dropped down, and then the bowl would have broken by a sudden concussion, such as a fall. In his opinion the bowl was improperly packed, and he says that it should have been put into a larger box with sufficient padding so as to provide against such a contingency. He also says that he could not, if he tried, break the bowl by shaking the box with no packing round the bowl. The box was not broken and is strong enough to withstand any ordinary pressure. The evidence, I think, shows that the bowl would not have been broken if ordinary and reasonable care had been taken of the parcel during transit. An insured parcel is not improperly packed because the article inside could be broken by the package being subjected to a sudden concussion, such as a fall. No doubt the bowl could have been better packed; but I cannot find from the evidence that the breakage is due to any fault or negligence of the sender, or to improper or insecure packing.

The question whether there was any visible damage to the box or seals was never raised; and the box (an old one, which has in fact a dent at the end near the top) having been opened at the suggestion of the Postal authorities, with a view to the plaintiff claiming compensation in the event of the bowl being found to be broken, any defence that might have been raised under this head must be deemed to have been waived.

The plaintiff did not take delivery of the parcel, and there has been no fraud on the part of the sender or the plaintiff.

As to the contention that the value of the bowl as assessed by the plaintiff is excessive, the bowl appears to be a unique article, and therefore its real value is difficult to determine. A witness for the plaintiff states he has seen much smaller bowls at Tellery's the price of which was Rs. 1,000, and Mr. Davies assesses the value of the bowl at Rs. 600, having sold a bowl 7 x 8 inches long for Rs. 100. The plaintiff, I think, honestly thought the bowl was worth £100, and there was no fraudulent insurance for a sum above the real value of the article. The case is analogous to the case of a total loss under a valued policy; and unless the defendant can show that the plaintiff has greatly overvalued the bowl, and this has not been done, I think it is only reasonable to allow the valuation originally fixed, to stand good. For these reasons, I think, the defendant is liable to pay the amount of the insurance, viz., Rs. 1,500. The customs 5 per cent. duty is levied upon the importation of the bowl into India, and there is nothing to show that the bowl was broken before its arrival at Bombay. There will be a decree therefore for Rs. 1,500 with costs, and pleader's certificate.

At the request of the defendant's attorney, the judgment is made contingent upon the opinion of the High Court."

On the 11th February 1903, the reference came on for hearing before the High Court.

*Mr. Hill* for the plaintiff. I raise a preliminary objection to this reference. This reference does not come under either s. 69 of the Presidency Small Cause Courts Act or s. 617 of the Civil Procedure Code. The judgment of the Small Cause Court Judge is delivered and then an application for a reference is made. The

application for a reference should be made before judgment, under s. 69 of the Small Cause Courts Act. The Judge before delivering judgment must make up his mind to give judgment subject to the opinion of the High Court. The reference does not come under s. 617 of the Code, inasmuch as the Judge of the Small Cause Court has not entertained a reasonable doubt on any question of law.

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If the reference comes under s. 69 of the Small Cause Courts Act, then this Court has no power to send it back for amendment under s. 621 of the Code. I submit, therefore, that the reference, as it stands, is bad.

Advocate-General (*Mr. J. T. Woodroffe*) for the defendant. The order of reference is within the terms of s. 69 of the Small Cause Courts Act. In s. 617 of the Civil Procedure Code, the words "and the point on which doubt is entertained" do not apply to a reference made under s. 69 of the Small Cause Courts Act. That Court must refer a case where a question of law arises, whether it entertains doubt upon the point or not: *Ralli Brothers v. Goeulbhai Mulchand*(1), *Ishwardas Tribhovandas v. Kalidas Bhaidas*(2), *Yule & Co. v. Mahomed Hossain*(3). [MACLEAN C.J. Section 69 of the Small Cause Courts Act does not confer any power on the High Court.] The only power this Court has, is under s. 617 of the Code.

**MACLEAN C.J.** It is not a very easy matter to make section 69 of the Presidency Small Cause Courts Act dovetail into section 617 of the Code of Civil Procedure. As regards section 69 in the class of suits mentioned in that section, and in the event of a question of law arising, and if either party so requires, the Small Cause Court shall draw up a statement of the facts of the case and refer such statement, under section 617 of the Code, for the opinion of the High Court. Pausing there for a moment, there is nothing in that section which necessitates that the Small Cause Court Judge in drawing up the statement should state what the point of law is which has arisen, whether he has any reasonable doubt upon that point of law, or that he should express his opinion upon it. But the section says:—"and refer such statement under s. 617 of the Code of Civil Procedure," from which I am

(1) (1890) I. L. R. 15 Bom. 376, 386. (2) (1896) I. L. R. 20 Bom. 779.

(3) (1896) I. L. R. 24 Cal. 129.

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led to infer that this is the section which enables this Court to express its opinion upon the matter referred when it has been referred. It has not been suggested that we derive our authority from any other source. But looking at section 617, it seems to me that the Court can only express its opinion upon the matter referred, when three conditions have been complied with—*first*, that the Court referring the matter entertains a reasonable doubt upon some question of law, *second*, states what the point is upon which the doubt is entertained, and, *third*, draws up a statement of the facts containing an expression of opinion on the point which is referred to the decision of this Court. This is how I read the two sections in conjunction.

In the case before us, the Judge in the referring Court has not stated any point of law upon which he entertains a reasonable doubt, or what the point of law is, or what his opinion is upon it, and under section 617 I think he must do this before we can deal with the matter. It may be, we do not know, that he has a reasonable doubt upon some point of law. We have, I think, power under section 621 to return the case to the Lower Court for amendment and this course we will adopt.

We refer it back to the Judge in the Court below to say whether there is any point of law upon which he entertains reasonable doubt, and what it is, and what is his own opinion upon it.

**STEVENS J.** I concur.

**SALE J.** I agree with the view which has been taken by the learned Chief Justice, of section 69 of the Presidency Small Cause Courts Act, and section 617 of the Code of Civil Procedure. I can only read section 69 of the Presidency Small Cause Courts Act as meaning and contemplating that the opinion to be expressed by this Court is an opinion governed by section 617 of the Code of Civil Procedure. That being so, it seems to me that before this Court can express an opinion upon a case referred under section 69 of the Presidency Small Cause Courts Act, the conditions contained in section 617 must be complied with.

Attorney for the plaintiff: *A. C. Ghose.*

Attorney for the defendant: *H. C. Eggar.*

R. G. M.



## APPELLATE CIVIL.

SHIB DASS DASS

v.

KALI KUMAR ROY.\*

1908

March 18.

*Mortgage—Sale of mortgaged property—Money-decree—Transfer of Property Act (IV of 1882) ss. 67, 99—Execution—Purchase by the mortgagee, effect of—Mortgagee, liabilities of—Account.*

A mortgagee, in execution of a decree obtained against the mortgagor on account of another debt, sold the mortgaged properties, purchased the equity of redemption himself, and obtained possession through the Court. And in a subsequent suit upon the mortgage for sale of the mortgaged properties, the defence, *inter alia*, was that the proceedings were contrary to the provisions of s. 99 of the Transfer of Property Act, that the purchase by the plaintiff was null and void, and that the mortgagee was bound to account for the period he was in possession of the mortgaged property:

*Held*, that, having regard to the provisions of s. 99 of the Transfer of Property Act, the purchase by the mortgagee was null and void, and possession obtained by him was not in accordance with law, and he was therefore liable to render account of moneys realized from the mortgaged properties during the term of his possession.

*Durgayya v. Anantha* (1) followed, and *Sri Raja Papamma Rao v. Sri Vira Pratapa Ramachandra Rao* (2) referred to.

SECOND appeal, No. 1591, by Shib Dass Dass, the defendant No. 2; and No. 1846 by Annoda Charan Roy, the defendant No. 1.

These appeals arose out of an action brought by the plaintiffs Kali Kumar Roy and others on a simple mortgage bond, for sale of the mortgaged property. It appeared that on the 26th August 1885, defendant No. 1 mortgaged some 20 drones of land with other land to the plaintiff for Rs. 1,400. On the 5th March 1887 for the interest due on the mortgage bond, the mortgagor conveyed 6 drones of the mortgaged property to the mortgagee, and it was agreed that the mortgage should subsist

\* Appeals from Appellate Decrees Nos. 1591 and 1846 of 1899, against the decree of G. Gordon, Esq., District Judge of Chittagong, dated the 26th April 1899, reversing the decree of Babu Jogendra Nath Ray, Subordinate Judge of Chittagong, dated the 27th of July 1898.

(1) (1890) I. L. R. 14 Mad. 74.

(2) (1896) I. L. R. 19 Mad. 240; I. R. 23 I. A. 32.

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over some 12 drones of the land originally mortgaged. On the 17th September 1888, defendant No. 2 advanced defendant No. 1 the sum of Rs. 341, and took a mortgage upon part of the abovementioned 12 drones of land. On the 25th July 1889, the plaintiffs, in execution of a decree, upon a claim not arising out of the mortgage, put up the property to sale and purchased it themselves for the sum of Rs. 1,000, took possession of the property under their sale, and registered their names as owners on the 5th June 1891. In the year 1889, when the property was put up to sale, the plaintiffs made a declaration that the purchase would be subject to their mortgage, as also to the mortgage of defendant No. 2. The defendants pleaded, *inter alia*, that inasmuch as the mortgaged property was purchased by the plaintiffs, and as they were in possession for several years, they could not sue to recover the money by the sale of the mortgaged property. The defendant No. 1 also contended that the mortgage debt had been paid off by the usufruct of the mortgaged property of which the plaintiffs were in possession for several years. The defendant No. 2 further contended that the plaintiffs were estopped from bringing the suit as they purchased the property subject to his mortgage, and they subsequently agreed to pay the mortgage debt due to him, and that the suit was not maintainable, as it was a suit to recover money by sale of a portion of the mortgaged property. The Court of First Instance dismissed the plaintiffs' suit. On appeal, the District Judge of Ohittagong, Mr. G. Gordon, holding that the plaintiffs intended to keep their mortgage alive as against the puisne mortgagee, set aside the decision of the First Court and decreed the plaintiffs' suit. The material portion of his judgment, for the purposes of this report, is as follows:—

“ The question that remains is whether the appellants (plaintiffs) are entitled to have the property sold in order to satisfy their mortgage, or whether they are in the first place bound to render an account of the sums received by them from the property in question during the years that they have been in possession.

“ It appears to me, that the presumption is that the proceeds of the sale of the property would be sufficient to pay off the mortgage debts. If they are insufficient, the respondent No. 2 (defendant No. 2), who has waited so long and allowed both his own claim and that of the appellants to accumulate, is not entitled to any special consideration.

"As regards respondent No. 1 (defendant No. 1), he has already allowed the appellants to hold possession for so long a time that he cannot again set up any claim. There is nothing to show that the price which the appellants originally paid was inadequate.

"I do not, therefore, think that upon consideration of equity the appellants should be compelled to render an account."

*Dr. Ashutosh Mookerji and Babu Soshi Shekhur Bose* for the appellant, *Shib Dass Dass*.

*Babu Akhoy Kumar Banerjee* for the appellant, *Annoda Oharan Roy*.

*Babu Harendra Narain Mitter, Babu Dharendra Lal Khastgir and Babu Amarendra Nath Chatterjee* for the respondent.

*Cur. adv. vult.*

**PRINSEP AND STRIPPER JJ.** The plaintiffs sue on a mortgage to obtain a decree for sale of the mortgaged property in order to realize the amount due. The defendant No. 1 is the mortgagor, and defendant No. 2 holds a second mortgage. It appears that the plaintiffs obtained a decree against the mortgagor on another debt, and in execution of that decree sold the equity of redemption belonging to the mortgagor, bought the property themselves, and obtained possession as auction-purchasers through the Court.

An objection was raised to these proceedings which, it was contended, were contrary to section 99 of the Transfer of Property Act; and it was further contended that the proceedings in that suit and the sale to the plaintiffs were null and void. The terms of section 99 are clearly in favour of this contention, and forbid a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, from attaching the mortgaged property, or bringing it to sale otherwise than by a suit regularly brought under section 67 of the Act. The possession obtained by the plaintiffs was not as mortgagees, but as creditors who had obtained a decree for another debt. The plaintiffs' possession obtained in execution of that decree was therefore not in accordance with law. For this we find authority in the case of *Durgayya v. Anantha*(1) in which

(1) (1890) I. L. R. 14 Mad. 74.

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we concur. We have also had cited before us the case of *Sri Raja Papanma Rao v. Sri Vira Pratapa H. V. Ramachandra Rami*(1). In that case it was held by the High Court that the plaintiff was put into possession in execution of a decree obtained on his mortgage. Their Lordships of the Privy Council, however, held that the mortgage did not give the mortgagee the right claimed, and that, consequently, his possession was not a lawful possession so as to bar the right of the mortgagor to redeem. That suit was brought, by the mortgagors for possession after taking an account of the rents and profits realized by the mortgagees from the date of their obtaining possession in execution of their decree. The question now before us, which relates to section 99 of the Transfer of Property Act, consequently did not arise in that case, but it is an authority for showing that an account may be taken from a mortgagee, notwithstanding that he may have obtained possession otherwise than in execution of a decree properly obtained.

The District Judge in appeal has refused to allow the profits, realized by the mortgagees during the term of their possession in execution of their decree, to be taken into the account which he has ordered, although, by reason of section 99 of the Transfer of Property Act, the decree by which the mortgagees obtained possession conferred no legal title. It is in respect of this order that appeals have been made separately both by the second mortgagee (defendant No. 2) and by the mortgagor (defendant No. 1). Both these appeals proceed on the same ground, except that in the appeal by the mortgagor an objection has been raised regarding the sum of Rs. 1,000, which was paid by the plaintiffs, the auction-purchasers, of the equity of redemption to him. We are of opinion that in the account to be taken of the amount due on the mortgage to the plaintiffs which is the first mortgage, the amount realized by them during the period of their possession, as purchasers under the decree obtained by them, should be set off against the amount due under their mortgage, and that on the other hand the plaintiffs-mortgagees are entitled to receive credit for the sum of Rs. 1,000 paid by them as purchasers to the mortgagor. It would be inequitable to allow the mortgagor to

(1) (1896) I. L. R. 19 Mad. 249 ; L. R. 23 I. A. 32.

retain this money, and at the same time to give him credit for the amount realized by the mortgagee during the possession which must be considered as an unlawful possession. The order of the District Judge is accordingly modified in respect of the manner in which the account should be taken. The appellants are each entitled to receive their costs in their respective appeals.

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*Decree modified.*

S. C. G.

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# APPEAL FROM ORIGINAL CIVIL.

1908

Feb. 9.

AGHORE NATH MOOKERJEE

v.

ADMINISTRATOR-GENERAL OF BENGAL.\*

*Sale—Decree—Execution—Conditions of sale—Title, abstract of, not corresponding with original—Setting aside sale, application for—Purchase-money, return of.*

A purchaser of property at the Registrar's sale in execution of a mortgage decree accepted the conditions of sale, whereby he was required to furnish requisitions within ten days after the actual delivery of the abstract of title. The purchaser did not furnish any requisitions.

On the 19th August 1899, by an order of the Court the purchaser was to pay the balance of the purchase-money into Court (he having already made deposit) without prejudice to his right to raise any question as to title or compensation. On the 31st August 1899 the purchaser paid the balance of the purchase-money under compliance of the order of the 19th August 1899. On the 26th April 1900 the purchaser applied for annulment of the sale or for compensation. On the 30th August 1900 the sale was set aside, but that order was reversed on appeal on the 28th February 1902.

After the order of the 28th February 1902, the purchaser asked for inspection of the title-deeds in order to compare them with the abstract, and upon having certain Persian writing, which he discovered amongst them, read by an expert, found that the abstract of title did not correspond with the original documents of title. The purchaser then having applied to have the sale set aside and his purchase-money refunded:

*Held*, that the purchaser, though he had not furnished his requisitions within the time allowed by the conditions of sale, was not debarred from applying to the Court to set aside the sale on the ground that the abstract was incorrect and contained a material misdescription; and that he was, under the circumstances, entitled to have his purchase-money refunded.

*In re Bamister*(1), *M'Culloch v. Gregory* (2), *Elsie v. Elsie* (3), *Upendra Nath Mitter v. Obhoy Kali Dassee*(4) referred to.

APPEAL by the defendant, Aghore Nath Mookerjee.

The defendant, Aghore Nath Mookerjee, purchased for Rs. 12,600 certain property which had been put up for sale by the Registrar of the High Court on the 8th July 1899, in

\* Appeal from Original Civil No. 29 of 1902 in suit No. 652 of 1894.

*Appellate Bench*: Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Sale, and Mr. Justice Stevens.

(1) (1879) L. R. 12 Ch. D. 131, 150.

(3) (1871) L. R. 13 Eq. 196.

(2) (1855) 1 Kay and J. 286.

(4) (1901) 5 C. W. N. 593.

execution of a mortgage decree obtained by the Administrator-General as representative of the mortgagee, Nundo Lall Mullick, and the purchaser deposited Rs. 3,200. One of the conditions of sale being that the purchaser was to furnish his requisitions within ten days after delivery of the abstract of title, time being of the essence of the contract. On the 13th July 1899 the abstract of title was sent by the attorney acting for the Administrator-General to the attorney of the purchaser. On the 19th August 1899 the purchaser obtained an order giving him liberty to pay the balance of the purchase-money without prejudice to his right to raise any question as to title or compensation. On the 31st August 1899 the purchaser paid in the balance. On the 9th January 1900 the purchaser with his attorney inspected the title-deeds. On the 20th April 1900 the purchaser applied before Mr. Justice Sale for rectification of the boundaries or for compensation, or if he could not obtain compensation, for annulment of the sale. The Court gave an order for setting aside the sale. On appeal this order was reversed on the 28th February 1902, and the sale was directed to stand, and the matter was remanded for determination of the compensation. On the 8th May 1902 the attorney for the purchaser called for the original documents, and then discovered that this particular pottah was executed in Persian not by Munna Jan Begum, but by some other person, and upon that objected to accept the document as the document set up in the abstract; and applied to have the sale set aside and his purchase-money refunded. This application came on before Mr. Justice Ameer Ali on the 3rd September 1902, who observed as follows:—

“In my opinion it is not open to me on an application of this kind to consider whether the document was in fact executed by Munna Jan Begum or not, nor can I go into the question when that lady died or what the effect of that document is. Supposing it is not executed by Munna Jan Begum, as I pointed out to the learned Advocate-General when he was arguing the matter, it is wholly impossible for this Court on an application of this nature to determine questions of the character referred to above.

“I propose therefore to apply myself to the only question which can be determined upon this application, *viz.*, whether the document to which objection is taken answers the description set forth in the abstract of title. It is a Bengalee document. There is some Persian writing on one side. The name of Munna Jan appears in Bengalee. On another side the Bengalee clerk of

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Carruthers & Co., who prepared the abstract of title, swears that he believed that the Persian writing on the right-hand side of the document bore the name of Munna Jan. The seal is undecipherable, and he accordingly in the abstract of title gave the following description:—

‘21st Aghrain 1226.

Signed by Munna Jan Begum in Persian character and a seal affixed.’

“The Persian writing does not, as a matter of fact, contain the name of Munna Jan Begum, but the purchaser’s attorney had, on the 9th of January 1900, in the company of his client, inspected these very documents, and it did not strike him to have the Persian writing read to him by somebody acquainted with the Persian language, and he took no steps to satisfy himself whether the signature was by Munna Jan Begum.

“The smallest exercise of common sense would have shown to him the necessity of having that writing read to him. There is no allegation that Carruthers & Co.’s clerk knew Persian and made a false statement regarding the signature in the abstract of title. He was unable to read the writing, and as he found the name Munna Jan in the Bengalee writing, he took the Persian to be her name. A great deal of reliance has been placed on the case reported in 5 Calc. Weekly Notes, p. 593. The facts of that case, however, appear to me to be totally different from the present. There misrepresentation was in fact made in the abstract of title regarding the interest of the deceased person. Here the only mistake is with reference to the signature by Munna Jan Begum in Persian, which appears to me due entirely to the ignorance of the Persian language on the part of Carruthers’ clerk. The mistake, as I have mentioned already, could have been corrected at once if the least degree of caution had been exercised by the purchaser’s attorney. It is entirely to his neglect of an obvious duty that the difficulty, if any, to which his client has been put is owing. I do not think that this is a case in which I ought to interfere. I was asked to refer the matter to the Registrar to enquire and report whether a marketable title could be given to the purchaser upon the documents set forth in the abstract of title. I think that it would be utterly impossible for that officer to determine a question of that character upon the facts of this case.

“Here there is a document executed in the year 1819. Since that time various transfers have taken place. Considerations of a very important character will arise when the matter of interest of the mortgagor in this case comes to be determined in a proper proceeding. I discharge the rule with costs.”

From this decision the defendant, Aghore Nath Mookerjee, now appealed.

Mr. Sinha (*Mr. O’Kinealy* with him) for the Appellant. The only question is whether I have taken the objection to the abstract of title in time. If a person who has to make the abstract makes a mistake, he cannot say that the purchaser will have to bear the brunt of his mistake. The first inspection made by the purchaser of the abstract was on the 9th January 1900.

The case of *Upendra Nath Mitter v. Obhoy Kali Dassee*(1) is an authority for showing that it is not necessary to make out a case of fraud in order to set aside a contract of sale.

On the authority of the above case and also the English case of *In re Banister*(2), I am not precluded from raising the question as to the abstract of title on the ground of time.

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This matter ought to go to the Registrar, on reference.

Mr. Dunne and *Mr. Knight* for the respondent. No application was made by the other side in the Lower Court to have the case referred to the Registrar at all.

The purchaser refrains from stating when he first saw the abstract of title. He must make his objections to title within ten days. Under the conditions of sale the purchaser had ten days to state his objections, which he did not do.

He has not proved that there is not a good title to the property. On the evidence it appears that the appellant was a resident of Khidderpur. It is reasonable to suppose then, that he had heard of the former suits in which the *Matwalki* of the Hooghli Imam-baree asserted his title.

If the appeal be dismissed, the appellant is not without a remedy, in case he suffer any loss. He has an action for negligence against his attorney.

MACLEAN C.J. On the 8th of July 1899 the present appellant became the purchaser of certain property which was put up for sale by auction under a decree in a mortgage suit; and, on the same day he made a deposit of 3,200 rupees, the purchase-money of the lot he purchased being 12,600 rupees. Under the seventh condition of sale the abstract of title was to be delivered within seven days from the certificate; and, the purchaser was to make his requisitions within ten days after the actual delivery of the abstract, and in this respect time was to be deemed as of the essence of the contract, and the title was to be considered as approved of and accepted by the purchaser, subject only to such objections and requisitions if any.

(1) (1901) 5 C. W. N. 593.

(2) (1879) L. R. 12 Ch. D. 131.

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The abstract was duly delivered within the seven days, but no requisitions or objections were taken by the purchaser within the ten days limited by the condition.

On the 19th of August, an order was made in the suit that the present appellant, the purchaser, should be at liberty to pay into Court the balance of the purchase-money without prejudice to his right to raise any question as to title or compensation; and, this order was complied with on the 31st of August by the purchaser paying in the balance.

On the 26th of April 1900 the purchaser applied for the annulment of the sale or for compensation, on certain grounds which he alleged: and on the 30th of August 1900 the sale was set aside. That order, however, was reversed by the Court on appeal on the 28th of February 1902, this Court holding that it was not a case for setting aside the sale, but for a compensation. For present purposes nothing turns upon these orders.

On the 9th January 1900, the purchaser asked for inspection of the title-deeds, and, as to this he stated in his petition, which is verified by affidavit, and, in substance not contradicted, that "the petitioner being desirous of looking into the documents relating to the property purchased by him and set out in the abstract of title called with his attorney, Babu Bepin Behari Banerjee, at the office of Messrs. Carruthers & Co., to inspect the same, and a bundle of documents relating to this, as also of other property, including a Bengalee pottah, were produced and shown, and he looked into the Bengalee writings in the said pottah, but your petitioner and his attorney were unable to understand the Persian writings, and had no notice whatever or any reason to suppose that the pottah produced was not in accordance with the abstract." The pottah is referred to in the abstract of title in these terms: "By a Bengalee pottah of the 21st of *Aughran* 1226 B.S. (5th December 1891), granted by Munna Jan Begum to Chaytan Mandal, *bastoo* land 4 cottahs and *patit* land 3 cottahs (total 7 cottahs of land), to be held and enjoyed in succession of son and grandson with power of sale and gift, on payment of annual rent of Re. 1-8. Signed by Munna Jan Begum in Persian character and seal affixed."

After the order of the 28th February 1902, the purchaser again asked to inspect the title-deeds, to compare them with the abstract of title, and this request was complied with. And this, as appears from the petitioner's verified petition, is what occurred: "20. On receipt of the said document," that is, the pottah in question, "from the plaintiff's attorney, your petitioner caused the said pottah to be read out by an expert, who thoroughly understands the Persian language and character, and he then found out that the said pottah was neither granted by Munna Jan Begum nor was it signed by her, but it appears from the Persian writings therein that the same was signed by" certain other person named in that paragraph. "A copy of translation of the said pottah as made by one of the sworn translators of this Honourable Court is hereunto annexed and marked with the letter B." "21. That your petitioner then came to know that the first abstracted document, namely, the pottah granted by Munna Jan Begum in favour of Ohaytan Mandal and signed by Munna Jan Begum, does not correspond with the document as described in the abstract of title. The said document is described in the abstract of title thus"—I need not read it again, as I have read it just now—"but it appears from the original pottah sent by Messrs. Carruthers & Co. on the 5th day of May last that the said document was not granted by Munna Jan Begum, but by one Jonab Nawab Syed Ali Khan Bahadur, Mutwalli of the said Emambaree of Hooghly."

Upon that the purchaser made the present application by which he asks to have his purchase-money refunded with interest and costs: and, the question we have have to decide is whether under these circumstances, which are practically undisputed, he is entitled to that relief.

The learned Judge in the Court below concluded that he was not, and hence the present appeal.

It is clear that the description given in the abstract of title, of this pottah, which is admittedly the root of title to the property sold, is wholly at variance with the document itself. In point of fact there is no pottah granted by Munna Jan Begum, nor was any such pottah ever signed by her. In other words, the title-deed, which is made the root of title, does not exist. Under these

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circumstances the purchaser says that the vendors cannot make out a title, and that he is entitled to have the contract rescinded and his purchase-money returned.

The vendors, in reply, say that the purchaser is barred by condition 7 from now raising this objection. I dissent from that view. That condition cannot apply to a case where the abstract delivered is incorrect, and contains a most material misdescription of the document which is made the root of title. That condition presupposes that the abstract of title delivered will be an accurate and true one.

The purchase-money is still in Court, and the sale has not been confirmed, and the purchaser having discovered, under the circumstances, I have stated, the true facts of the case, there is nothing to prevent him from bringing them before the Court, and asking for the return of his purchase-money.

It is said he was guilty of carelessness on the 9th January 1900, in not doing then what he subsequently did, namely, having a translation made of the pottah and seeing what the document really was.

I do not know that it lies in the mouth of the vendors to say this, for the purchaser may retort that he was entitled to rely on the statement in the abstract as to the nature of the pottah: any way it is not sufficient to prevent him from now raising the question.

The sale in question was one under the direction of the Court: and, it was pointed out by Lord Justice Cotton in the case of *In re Banister*(1) what is the duty of the Court in cases akin to the present. His Lordship says:—

“In a case of this sort where the sale is by the Court, the Court is bound to take more special care, if possible, that there shall be nothing in the conditions, or in the representations there in contained, which by possibility can mislead a vendor, because the purchaser has a right to assume that the Court will take very good care that there shall be nothing that can in any way mislead him as to the title he is getting.”

Such cases as *M'Culloch v. Gregory*(2), *Elee v. Elee*(3), which are commented upon in a recent case in this Court by Mr. Justice

(1) (1879) L. R. 12 Ch. D. 181, 180.

(2) (1855) 1 Kay and J. 286.

(3) (1871) L. R. 13 Eq. 196.

Stanley [*Upendra Nath Mitter v. Abhoy Kali Dassee*(1)], support the principle that, under circumstances such as the present, the purchaser is entitled to have his purchase-money refunded. There is no such pottah as is represented in the abstract, and there has been a material misrepresentation, as to this.

For these reasons the order of the Court below must be discharged.

As regards the precise order to be made, we will give Mr. Dunne's client a week to consider whether, under the circumstances, he thinks it worth while to have a reference to title, the present appellant not objecting to such reference if the other side so desire.

We will deal with the question of costs after Mr. Dunne's client has decided what he will do.

STEVENS J. I concur.

SALE J. In assenting to the order which the learned Chief Justice proposes to make in this matter, I wish to say that I entirely agree with the view which has been taken as regards the operation of condition 7 of the conditions of sale. I agree that it does not operate so as to preclude the purchaser from raising a question as regards misrepresentation after the period mentioned in the condition for raising objections to the abstract of title. I also agree, that sitting here as a Court of Equity, we ought not in a case where there has been admittedly serious misrepresentation as regards a material document of title, to hold the purchaser to his bargain without a previous reference as to title.

[At the expiration of a week their Lordships made the following order :—]

MACLEAN C.J. This case stood over for a week to give Mr. Dunne's clients an opportunity of saying whether they desired to have a reference to title. Mr. Dunne tells us this morning, that they do not ask for such a reference, and I think they are wise in the conclusion they have come to.

The result, then, will be that there will be an order for the return of the purchase-money to the appellant, and the appellant,

(1) (1901) 5 C. W. N. 593.

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the purchaser, will have his costs of this appeal and in the Lower Court.

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SALE J. I concur.

STEVENS J. I concur.

Attorney for the appellant: *Bepin Behari Banerjee.*

Attorney for the respondent: *G. C. Chunder.*

R. G. M.

ORIGINAL CIVIL.

MACKERTICH

v.

NOBO COOMAR RAY.*

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Contract—Breach of contract—Damages, measure of—Delivery, specific period for—Seller's option—Notice of inability to perform contract.

If a vendor has any specific period of time allowed to him to deliver goods, and before the time has elapsed gives notice to the purchaser that he will be unable to complete the delivery, the purchaser not rescinding the contract, the measure of damages is the difference between the contract price and the price of the subject-matter on the last day of the period within which the delivery ought to have been made.

The terms "shipment at seller's option during August-September" in a contract do not mean that the seller has an optional period of two separate months in which he can deliver, but they refer merely to the character of the delivery.

Leigh v. Paterson(1) referred to.

ORIGINAL SUIT.

The plaintiff contracted to buy from the defendant and the defendant contracted to sell to the plaintiff, by bought and sold notes, dated the 19th July 1889, 2,000 *kutcha* bales of jute of a particular quality at Rs. 4-12 per bazar maund, and by another contract entered into on the same date, another quantity of 1,000 *kutcha* bales of jute of another quality at Rs. 4-4 per maund. Shipment was to be at the seller's option during 'August-September,' and the jute was to be delivered by the defendant at Watson's Press at Calcutta. Some time in the month of August the defendant gave notice to the plaintiff of his inability to perform the contract, but the plaintiff did not consent to the contract being rescinded. The plaintiff sued the defendant to recover damages for breach of contract. The defendant admitted the contract and the breach thereof.

* Original Civil Suit No. 776 of 1901.

(1) (1818) 3 Taunt. 540.

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Mr. Sinha for the plaintiff. If the goods were despatched from the defendant's place of business on the last day of the period within which the delivery was to have been made, *i.e.*, the 30th of September, they would have arrived at Watson's Press, the place of delivery mentioned in the contract, on the 6th of October. The measure of damages should therefore be the difference between the price at the contract rate and that at the market rate on the 6th October.

Mr. S. R. Das for the defendant. The period of time allowed to the vendor for making delivery was an optional period of two separate months in which he could deliver, and since he gave notice, some time in August, of his inability to perform, the measure of damages should be the difference between the price at the contract rate and that at the market rate on the 31st August.

ANNEE ALI J. This is a suit for damages brought under the following circumstances.

The plaintiff, who is a merchant and dealer in jute and carries on business in Calcutta, contracted to buy from the defendant and the defendant contracted to sell to the plaintiff, by bought and sold notes dated the 19th July 1899, 2,000 *kutcha* bales of certain jute at Rs. 4-12 per bazar maund. By another contract entered into on the same date, the plaintiff agreed to purchase and the defendant agreed to sell to the plaintiff another quantity of 1,000 *kutcha* bales of the same kind of jute, delivery or shipment was to be, at the seller's option, during 'August-September.' In the month of August the defendant gave notice to the plaintiff, of his inability to perform the contract. It is quite clear that the plaintiff on receiving the notice was under no obligation to go into the market to buy the goods, nor could the contract be rescinded without the consent of the plaintiff.

No delivery having been made in terms of the contract, the plaintiff, some time in October, bought the quantity of jute which had been contracted for, and now claims the difference between the market rate prevailing on the 6th of October, and the contract price.

The defendant's contention is that the plaintiff is entitled to damages on the basis of the market rate prevailing on the 31st of

August and no further. This contention has been formulated by his counsel in this way. The defendant had the option of making shipment or delivery either in August or September, as it was open to him to make shipment in either of these months; he having given notice in August, the damages ought to be calculated on the basis of the market rate at the end of August: had he given notice in September, it would have been calculated at the market rate prevailing at the end of September. The argument is extremely ingenious. No authority, however, has been brought to my notice in support of the contention.

The text in Addison on Contracts based on the case of *Leigh v. Paterson*(1) is perfectly clear. In Addison the principle is thus stated:—"If the vendor has a month or any specific period of time allowed to him for making the delivery, and finds before the time has elapsed that he will be unable to complete the delivery, and gives notice to the purchaser that he refuses to proceed therewith, and the price rises, the measure of damages is the difference between the contract price and the higher price of the subject-matter on the last day of the period within which the delivery ought to have been made." In *Leigh v. Paterson* (1) the marginal note is as follows:—"If a vendor has time until a given day to deliver goods, and on prior day, when the prices are low, he refuses to proceed with the contract, after which the price rises, the purchaser, not rescinding, is entitled to recover the difference between the contract price and the higher price which the goods bear on the last day appointed for the fulfilment of the contract."

Mr. Das argues that the period of time allowed to the vendor in the present case, for making delivery, was not a continuous period, but an optional period of two separate months in which he could deliver. To my mind, it is a matter of indifference whether he has two months or one month for the purpose of fulfilling the contract. There is no doubt a difference between the use of the word "and" and the use of the word "or" in connection with the two months. The difference is only as regards the character of the delivery; for example, if the condition had been this delivery to be in "August and September," it would have

(1) (1818) 8 Taunt. 540.

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implied that the goods might be delivered in instalments throughout that period, the whole contract to be completed in those two months, viz., August and September. But where the expression is "August or September," in that case the whole contract might at the seller's option be completed in either of these two months. The option given to the seller to fulfil the contract either in August or September does not alter his liability for fulfilment of the contract. He had the whole of two months for the purpose of making delivery and fulfilling the contract. The measure of damages must be the market rate on the 30th September.

I do not agree with the contention of the learned counsel for the plaintiff that the measure of damages is to be taken at the market rate on the 6th of October. The condition as to price "per Calcutta bazar maund, the actual gross weight delivered at Watson's Press" refers, in my opinion, to the maundage on which the price was calculated, and not as to the term of delivery which is provided for separately at the bottom of the bought note.

I therefore refer the matter to the Official Referee, to find the market rate on the 30th of September, and assess damages on the basis of the difference between the contract rate and the market rate prevailing on that date.

[*Mr. Sinha.* I ask for costs of suit.

Mr. Das. I would ask your Lordship to reserve the question of costs at present, for there may not be any damages.]

I will reserve the costs.

Attorneys for the plaintiff: *Leslie and Hinds.*

Attorney for the defendant: *A. K. Guha.*

(1) (1818) 8 Taunt. 540.

FULL BENCH.

AJODHYA NATH KOILA

v.

RAJ KRISHTO BHAR.*

1902
Nov. 24.

Embankment, addition to—" Shall add to"—Bengal Embankment Act (Bengal Act II of 1882) ss. 76, cl. (a), 79.

The words "shall add to any existing embankments" in s. 76, cl. (a) of Bengal Act II of 1882, include an addition to the height of an embankment.
Goverdhan Sinker v. The Queen-Empress(1) overruled.

REFERENCE to Full Bench.

In this case a complaint was made to the Deputy Magistrate of Midnapore, at the instance of the Executive Engineer of the Cossye Division, by the complainant, Raj Krishto Bhar, that a private embankment, known as the Kolonda-Koptipur embankment, situated on the west side of the river Keleghai, had been raised up in height by the petitioner, Ajodhya Nath Koila, without the permission of the Collector, and that it was interfering with, or impeding and obstructing the public embankment at Gokulpur, which was on the other side of the river. That the raising up in height of the embankment had been done with a view to divert the current of the water. The petitioner denied having raised the embankment, but admitted having repaired it.

The petitioner was convicted, on the 9th April 1902, by the Deputy Magistrate, of an offence under s. 76, clause (a) of the Bengal Embankment Act, II of 1882, and was sentenced to pay a fine of Rs. 50, or in default to one month's simple imprisonment.

On the 28th April the petitioner obtained a Rule calling upon the District Magistrate of Midnapore to show cause why his conviction and sentence should not be set aside, on the ground

Full Bench: Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Prinsep, Mr. Justice Banerjee, Mr. Justice Hill, and Mr. Justice Stephen.

* Reference to Full Bench in Criminal Revision No. 428 of 1902.

(1) (1835) I. L. R. 11 Calc. 570,

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that no addition was made to an existing embankment within s. 76, clause (a) of Bengal Act II of 1882, as interpreted in the case of *Goverdhan Sinha v. The Queen-Empress* (1).

On the Rule coming on for hearing, the Judges composing the Criminal Bench of the High Court (HARINGTON AND BRETT JJ.), doubting the correctness of that decision, referred the matter to a Full Bench on the 13th July 1902.

The order of reference was as follows:—

On April 9th, 1902, Ajodhya Nath Koila was convicted before the learned Deputy Magistrate of Midnapore of an offence under section 76 (a) of Act II of 1882 (Bengal Embankment Act, 1882), and was fined Rs. 50, or in default one month's simple imprisonment.

Section 76 is in the following terms:—

"Every person who, in any of the territories to which this Act extends, without the previous permission of the Collector, shall erect, or cause or wilfully permit to be erected, any new embankment, or shall add to any existing embankment, or shall obstruct or divert, or cause or wilfully permit to be obstructed or diverted, any watercourse, if such act is likely to interfere with, counteract, or impede any public embankment or any public watercourse shall be liable, on conviction, to a fine not exceeding five hundred rupees, or in default of payment to imprisonment of either description for a period not exceeding six months."

The judgment of the Deputy Magistrate is as follows:—"Briefly, the facts of this case are to this effect:—Between two villages Gokulpur and Kolonda the river Keleghai passes. The village Gokulpur lies to the east of the river, while Kolonda and Koptipur lie to the west of it. Towards the Gokulpur side, there is the public embankment known as the Gokulpur embankment, and on the other side there is the private embankment known as the Kolonda-Koptipur embankment. The complaint made at the instance of the Executive Engineer, Cossye Division, is that the private embankment has been raised up in height and it has been done without the permission of the Collector, interfering with or impeding and obstructing the public embankment at Gokulpur, and it has been done with a view to divert the current of the water-course whereon there are public embankments. In his examination Ajodhya denies having raised the private embankment. He admits having repaired the same.

"From the sketch of the plan, as well as from the cross-section of the private embankment prepared by Raj Krishto Bhar, and whose correctness has not been questioned by the other side, it appears that at the highest points the height of the Kolonda embankment stood at 56'00, but it has been raised to 58'74. The Gokulpur embankment at the same line has a height of 56'24, and at another point where the Gokulpur embankment stands 56'80 and the other at 56'00, the Kolonda embankment has been raised to 58'40. If this is correct, and it seems to be so, the there is no doubt that the embankment on the west of the Keleghai river has been raised. If so, it is likely to divert and obstruct a water-course which will impede

(1). (1885) I. L. R. 11 Calc. 570.

the public embankment of Gokulpur? This would certainly be the case, if the private embankment had been raised in height. Raj Krishto Bhar further deposed that there are trees which point to the former height over the Kolonda embankment. He says that the raising of the embankment would turn away the flow of water in high flood time in the opposite direction, *viz.*, towards the direction of the Gokulpur embankment. Gurai Singha has also given evidence to the same effect. He has deposed that for the last 20 or 22 years water has passed over the Kolonda embankment, and the raising of the height would impede the water-course and make it flow in the opposite direction. Godadhar and Pachu also speak as to the raising of the embankment known as 'the Kolonda-Koptipur embankment.' So there is nothing to disbelieve the evidence of persons who have local knowledge and live in the locality.

Now the defence is chiefly directed to the fact that both the public embankment and the private embankment stand on the same height, but I have shown that the private one has been raised a little, and I have also shown that in such a case the result would be that water would flow over the Gokulpur public embankment, thus diverting the current of the water-course and otherwise obstructing it. It is absurd to suppose that both the embankments should be of the same height, for no such damage was done to the Gokulpur embankment, as it was the case with the private embankment where there was extraordinary flood last year, and the damages and partly washing off the same show in which direction the water flowed.

That being so, the Court comes to the conclusion that the raising of the Kolonda embankment is such as to interfere with the public embankment at Gokulpur and impede the water-course and that no permission has been taken to do so. The Court, therefore, finds Ajodhya Nath Koila guilty under section 76 (a) of the Embankment Act, and directs him to pay a fine of Rs. 50, or in default, one month's simple imprisonment. Under section 79 of the said Embankment Act I direct that within the period of one month the raised portion of the Kolonda embankment should be removed."

On April 28th a Rule was granted calling upon the District Magistrate to show cause why the conviction and sentence should not be set aside on the ground that no addition was made to an existing embankment within clause (a), section 76 of Bengal Act II of 1882, as interpreted in the case of *Goverdhan Sinha v. The Queen-Empress*(1).

In that case the learned Judges say that the words 'shall add to existing embankments' are not intended to mean any repair to an existing embankment, even if the effect of the repair be to make the embankment higher or broader. These words only mean an extension in the length of an existing embankment.

With all respect to the learned Judges who decided this case, we are unable to agree in the view that the words 'add to' only mean an extension in the length of an existing embankment and do not include an addition to the height of an existing embankment. Taking the ordinary meaning of the words, the expression 'shall add to' would include any addition to an embankment whether in length, breadth or height, and the section makes the adding to an existing embankment an offence 'if such act is likely to interfere with, counteract or impede, any public embankment

(1) (1885) I. L. R. 11 Calc. 570.

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or public water-course.' If an addition is made to a private embankment on one side of a stream which has the effect of making it higher than the public embankment on the other, so that some of the water which would otherwise have flowed over the top of the private embankment is caused to flow over the public embankment, it seems to us that the public embankment is, by the addition to the height of the private embankment, interfered with or counteracted. In view therefore of the object of the section, we are of opinion that any addition to an existing embankment is an offence under section 76 if such addition is likely to interfere with, counteract or impede any public embankment or any public water-course.

The question which we refer to the Full Bench is:—

Do the words 'shall add to any existing embankment' in section 76 (a) of Act II (B.C.) of 1882 include an addition to the height of an embankment?

Mr. P. L. Roy (Babu Sarat Chandra Dutt with him) for the petitioner. The words "add to" in s. 76 of Bengal Act II of 1882 can only mean an extension in the length of an existing embankment, and do not include an addition to its height. If they are held to mean addition in height, then it would be impossible to repair an embankment because such repair would necessarily effect some change in the height and breadth, and if any ordinary repair is not included, how is the line of demarcation to be drawn? If the section is construed in the way in which the learned referring Judges have construed it, there would be considerable difficulty in the application of the provisions of s. 79, under which the convicting Magistrate is only entitled to direct the removal of the embankment or obstruction. In the case of *Goverdhan Sinha v. The Queen-Empress*(1) their Lordships observed that "If throwing additional earth on an embankment means an addition to an existing embankment within the meaning of clause (b), it would be almost impossible for the convicting Magistrate to define the quantity of earth to be removed from the embankment in order to carry out the provisions of section 79." This case is entirely in favour of my contentions.

Deputy Legal Remembrancer (Mr. Douglas White) for the Crown was not called upon.

MACLEAY C.J. I think the question submitted to us ought to be answered in the affirmative. I do not think I can usefully add anything to what has been said by the learned Judges who have referred this case.

(1) (1895) I. L. R. 11 Calc. 570.

PRINSEP J. I am of the same opinion.

BANERJEE J. I am of the same opinion.

HILL J. I concur.

STEPHEN J. I concur.

D. S.

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CRIMINAL REVISION.

NARAYAN CHANGA

v.

EMPEROR.*

1902
Aug. 21.

Trial by jury—Procedure—Delivery of verdict—Verdict, partial record of—Criminal Procedure Code (Act V of 1898) ss. 300, 301, 303—Prejudice—New trial.

Where after the delivery of an unanimous verdict of the jury, convicting the accused of the charge of rioting in connection with certain land and the crops thereon, possession of which was claimed by the complainant as well as by the accused, the foreman of the jury attempted to add that "the land and the crops are all theirs" (meaning that they belonged to the accused), but was stopped by the Sessions Judge on the ground that the verdict was quite clear in its terms, and it was therefore unnecessary to hear anything further from them :—

Held, that it was undesirable to stop the jury at such a stage of the proceedings, that the words the foreman attempted to add to the verdict were very material, and that the accused having been seriously prejudiced by the procedure adopted by the Sessions Judge there should be a new trial.

RULE granted to the petitioners, Narayan Changa and another.

This was a Rule calling upon the District Magistrate of Dacca to show cause why the order of the Assistant Sessions Judge of Dacca, convicting the petitioners should not be quashed and a new trial ordered.

* Criminal Revision No. 755 of 1902, against the order of J. C. Mitter, Sessions Judge of Dacca, dated 19th May 1902, affirming the order passed by S. C. Dhar, Assistant Sessions Judge of Dacca, dated 8th March 1902.

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The petitioners were tried by the Assistant Sessions Judge and a jury on charges under ss. 147, 148, and 304, read with s. 149 of the Penal Code, of having taken part in a riot which occurred in respect of the possession of certain land which was claimed by the tenants of the Baliati Babus on the one side, and the tenants of one Hara Kumar Sarkar and others on the other side. In the course of the riot one of the tenants of the Baliati Babus was injured so severely that he subsequently died of his wounds. The petitioners who were the tenants of the second party alleged that they were at the time of the riot in possession of the disputed land, and had grown the paddy which was standing thereon, a portion of which had been cut by the rioters, although still unripe.

On the 6th March 1902, after the Assistant Sessions Judge had charged the jury, they retired to consider their verdict; upon their return the foreman informed the Court that the jury were not unanimous, and the Court requested them to retire again: in a few minutes they again returned, and the foreman informed the Court that the jury unanimously found the petitioners guilty under ss. 147 and 148 of the Penal Code, and not guilty under s. 304 read with s. 149 of that Code. The foreman immediately after delivering the verdict, attempted to add the words "the land and the crops are all theirs," meaning thereby that they belonged to the petitioners. The Assistant Sessions Judge stopped the foreman, and, declining to record the additional statement, reserved passing sentence till the next day.

On the 7th March an application supported by an affidavit was made by the petitioners to the Assistant Sessions Judge, asking him to refer the case to the High Court on the ground that after giving the verdict, the foreman wanted to state something which was in the petitioners' favour, and which showed that the verdict had been delivered under a misconception of the law governing the right of private defence of property.

The Assistant Sessions Judge rejected the application observing as follows:—

"That the verdict was quite clear in its terms and nothing was left to be ascertained. There was therefore no necessity for adopting the procedure laid down in s. 303 of the Criminal Procedure Code . . . . There was also no case of a wrong verdict being delivered by accident or mistake."



The petitioners appealed to the Sessions Judge of Dacca, who dismissed their appeal on the 19th May.

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*Mr. P. Mitter (Babu Hara Chandra Chakravarti with him)* for the petitioners. The Assistant Sessions Judge was wrong in not recording the additional statement with which the foreman of the jury wished to supplement the verdict. The facts alleged by the prosecution are, that we had gone to the disputed land two hundred in number, variously armed, to take possession; whereas we say that we were in possession, and had raised the crops, and that the other side were really the aggressors. The additional statement by the foreman is, therefore, very material, as it showed that the jury did not believe the story of the prosecution; and that being so, it would be for the jury to determine whether the petitioners who were not the aggressors had exceeded their right of private defence of their property.

**PRINSEP AND MITRA JJ.** The Assistant Sessions Judge, in a trial of the petitioners under charges of rioting (section 147) and rioting armed with deadly weapons (section 148) as well as other charges connected with injuries caused in the course of that rioting, recorded a verdict of the jury convicting the petitioners of charges connected with rioting, but acquitting them of the other charges. It appears that the Assistant Sessions Judge stated that in the first instance the jury were not unanimous, and that after retiring they returned, delivered an unanimous verdict, and after delivering a verdict convicting the petitioners of the charges of rioting, the foreman of the jury attempted to say something. He was stopped by the Judge, and it is this matter which has led to the proceedings now before us. The Assistant Sessions Judge attempts to justify his conduct by stating that, when the verdict of the jury had been so delivered, it was unnecessary to hear anything further from them. We cannot agree in this view. After the delivery of a verdict by a jury, it may be their desire to add a recommendation to mercy, and in this country it is specially undesirable to stop the jury at such a stage of the proceedings, for it may so happen that before the verdict is recorded, the foreman of the jury may make some observation in respect of that verdict which may show the presiding Judicial

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Officer that the jury have not properly understood the case, and then it would be the duty of the Sessions Judge not to record the verdict, but to recharge the jury so as to lay the case properly before them. In this particular case, although we have not the statement of the foreman as to what he was about to say, or had said in a manner inaudible to the Sessions Judge, the Sessions Judge has recorded that the pleaders of both sides, who apparently heard the words, agreed as to what was said, and we thus learn that, after the delivery of verdict convicting the accused of rioting and rioting armed with deadly weapons, the foreman of the jury added "the land and the crops are all theirs," meaning thereby that they belonged to the accused. If the Sessions Judge had heard this remark, he would certainly not have passed the extreme sentence provided by the law, and we further find that on the facts of this case, these words are very material because they would seem to show that the case for the prosecution was not regarded by the jury as established or, indeed, true. It would be for the jury, in this case, to determine whether the accused who were not the aggressors had or had not exceeded the right of private defence of their property. In this view, we think that the petitioners have been seriously prejudiced. We accordingly direct that a new trial be held.

D. S.

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# APPEAL FROM ORIGINAL CIVIL.

RAMSAY v. BOYLE.\*

1903  
April 2.

*Divorce—Divorces Act (IV of 1869) ss. 7, 11, 45—Parties—Intervention—Jurisdiction—Alleged adulteress, application by—Civil Procedure Code (Act XIV of 1892) s. 32.*

In a wife's suit for divorce against the husband on the ground of incestuous adultery, the Court has no power under the Indian Divorce Act (IV of 1869) to allow the alleged adulteress to intervene. The words "all proceedings under this Act between party and party" in section 45 of the Act apply only to proceedings after the parties to the suit have been determined, and the parties can only be determined in accordance with the provisions of the Act.

S. 7 of the Act does not apply to procedure.

S. 32 of the Civil Procedure Code (Act XIV of 1892) cannot apply to the case of substitution, dismissal, or addition of parties in divorce proceedings.

*Bell v. Bell* (1), *Abbott v. Abbott* (2), and *Lowe v. Lowe* (3) referred to.

APPEAL by the applicant, Mrs. E. J. Ramsay, against the judgment and order of HENDERSON J.

On the 9th of July 1902 Mrs. Ellen Thomas Boyle filed her petition, praying for an order that her marriage with the respondent, William McCormick Boyle, might be dissolved by reason of his incestuous adultery with her sister, Mrs. Edith Jane Ramsay. The respondent appeared in the proceedings and filed his answer denying that he ever committed adultery with the said Mrs. Ramsay. On the 18th of March 1903 the said Mrs. Ramsay made an application to Henderson J. for an order that she might be at liberty to intervene as a party respondent in the suit, to enter appearance and appear at the hearing in order to examine witnesses on her own behalf and cross-examine the witnesses who might be called by the petitioner, and to be heard by Counsel on her own behalf. His

\* Appeal from Original Civil No. 9 of 1903.

*Appellate Bench:* Sir Francis W. Maclean, K.C.I.B., Chief Justice, Mr. Justice Rampini, and Mr. Justice Mitra.

(1) (1883) L. R. 8 P. D. 217. (2) (1869) 4 B. L. R. (O.C.) 51.

(3) [1899] P. 204.

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Lordship delivered the following judgment dismissing the application:—

HENDERSON J. This is an application by a lady for an order that she may be at liberty to intervene, as a party respondent, in this suit to enter appearance and appear at the hearing, in order to examine witnesses on her own behalf and cross-examine the witnesses who may be called by the petitioner, and to be heard by Counsel in the ordinary way. She offers to waive service of notice, and has, I understand, served a copy of the answer, which she proposes to file on the parties in order that the suit may proceed without any delay.

The applicant is the sister of the petitioner in the case, and the allegation is that the respondent committed adultery with her, and that the allegation is the ground upon which the petitioner seeks for dissolution of her marriage. The applicant in her petition and also in her proposed answer denies the allegation of adultery. It is not suggested that there is any collusion between the petitioner and the respondent, and I am satisfied that this application is made *bond fide* by the lady for the purpose of protecting herself against the very serious consequences which an adverse finding on the question of adultery may have upon her reputation and social position.

A similar application was made to Mr. Justice Jenkins in the case of *Bailey v. Bailey*\* in Matrimonial suit No. 7 of 1896, on the 1st February 1897, and after argument the application was refused. It appears to me that there is no real difference between that case and the present application. As pointed out by

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\* BAILEY v. BAILEY.

*Divorce—Parties—Alleged adulteress, application by.*

In a wife's petition for dissolution of marriage by reason of the husband's adultery with one Mrs. Ollenbach, the latter applied and obtained this Rule calling upon the petitioner to show cause why she should not be allowed to intervene.

*Mr. Astoom* on behalf of the applicant, Mrs. Ollenbach.

*Mr. Dunne* on behalf of the petitioner for divorce.

JENKINS J. In this suit a lady, seeks for the dissolution of her marriage with her husband, alleging that he has been guilty of adultery with the present applicant, who is no party to the suit. The purpose of this application is to ensure that the applicant should be added as a respondent, and in support of that contention I have been referred first to an English case of *Bell v. Bell*(1), where a similar application was made with success. That case is obviously no authority here, for it is a decision on a section of the English Act which expressly provides that a lady is under such circumstances entitled to be added as a respondent. Indeed, so far as an inference can be drawn from the case, it is adverse to the respondent.

(1) (1888) L. R. 8 P. D. 217.

Mr. Justice Jenkins, in England a discretion is given to the Court under section 28 of 20-21 Vict. Chap. 85, to direct that a person with whom the husband is alleged in the petition of the wife to have committed adultery, be made a respondent, but although the Indian Act follows the English Act, it is silent upon this point. It has been suggested before me that the reason for this omission in the Indian Act is that that Act contains a special provision in section 45 dealing with procedure which makes the Civil Procedure Code applicable here. Section 45 which deals with proceedings "between party and party" declares that, "subject to the provisions contained in the Act, all proceedings under the Act between party and party shall be regulated by the Code of Civil Procedure." When the Indian Act was passed the Civil Procedure Code in force was Act VIII of 1859, and section 73 of

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The Indian Act, which follows the English Act, is silent on this point, and that although the provision of the English Act is contained in a section which commences in the same terms as the 11th section of the Indian Act. But then, it is said, section 7 assists the applicant. That section is in these terms: "subject to the provisions contained in this Act, the High Court shall in all suits and proceedings here under Act X give relief on the principles and rules which, in the opinion of the said Court, are as nearly as may be conformable to the principles and the rules which the Court for divorce and matrimonial causes in England for the time being acts and gives relief." It appears to me clear the expression "rules and principles" does not apply in support of the applicant's contention here. They point rather to the rules and principles on which the Court deals with these matrimonial causes in requiring a certain degree of evidence and other cognate matters.

Then reliance is placed upon section 45, which provides that, subject to the provisions herein contained, all proceedings under the Act between party and party shall be regulated by the Code of Civil Procedure. It is said that that makes section 32 of the Code of Civil Procedure applicable, and that this is a case in which it can properly be said that the applicant ought to have been joined or that her presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. It is very properly admitted by Mr. Avetoom that even if his client were added, no relief could be obtained against her, and she could not even be made to pay costs, and it is difficult to see how her presence as a party can be treated as necessary except in the sense that it may enable her to be represented by Counsel who would cross-examine, if need be, the petitioner and her witnesses. That does not seem to me to be a purpose contemplated by section 32. It is unnecessary for me now to express an opinion whether the Court could not under section 165 or 171 require the lady to be examined as a witness in the case; but it is at any rate clear that, should a decree nisi be obtained, it will be within her power to take the necessary steps under section 16 of Act IV of 1860 to bring before the Court all evidence that might be necessary for an adjudication on the case. I therefore refuse the application. The applicant must pay the costs.

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that Act directs that, if it appear to the Court at any hearing that all the persons who may be entitled to, or who claim, some share or interest in the subject-matter of the suit, and who may be likely to be affected by the result, have not been made parties, the Court may direct that they should be made either plaintiffs or defendants as the case may be. The present Code by section 32 enables the Court to order that the name of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added. These sections were considered by Mr. Justice Jenkins, and he was of opinion that they did not enable him to make the applicant before him a party respondent.

It has now been contended that the decision of Mr. Justice Jenkins is erroneous, and Mr. Hill has laid stress upon the words "persons . . . whose presence before the Court may be necessary to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit," and he has contended that the applicant in this case is a person likely to be affected by the result, to use the wording of the Code of 1859,—or a person whose presence is necessary to enable the Court to adjudicate effectually and completely upon the question of the adultery. The effect of the words quoted from the present Code was also considered by Mr. Justice Jenkins, and in his judgment he says—"It is very properly admitted by Mr. Avetoom that even if his client were added, no relief could be obtained against her, and she could not even be made to pay costs, and it is difficult to see how her presence as a party can be treated as necessary, except in the sense that it may enable her to be represented by Counsel who would cross-examine, if need be, the petitioner and her witnesses, that does not seem to me to be a purpose contemplated by section 32."

Here, there is no such admission as was made by learned counsel in that case. On the contrary, Mr. Hill has argued that relief, though not pecuniary relief, is claimed against the lady, because the relief that is really sought by the petitioner is on the footing of her action, that is, on the footing of her having committed adultery with the respondent, and that irreparable damage must naturally accrue to her in the event of an adverse finding. There is no doubt that she is indirectly affected, and it may be, very seriously affected, by the determination of the issue in the suit, but I am unable to give effect to this argument. The question in this suit is, whether the respondent committed adultery with his sister-in-law, and it seems to me that that question can be effectually and completely adjudicated upon without the lady being added as a party. No doubt grievous hardship may arise in this country by the exclusion of ladies situated as the present applicant is from participation in the proceedings. If this case had been heard in England, the Court would have had a discretion to allow the lady to appear, but I agree with Mr. Justice Jenkins that the law of this country allows no such discretion. If I had the power to grant this application, I would have been glad to have done so.

Holding the view I do, I think it is unnecessary for me to discuss the various cases quoted by Mr. Hill. The application must be dismissed with costs.

The applicant, Mrs. Ramsay, appealed against the above judgment and order of Henderson J., contending that her

presence before the Court was necessary in order to enable the Court effectually and completely to adjudicate upon, and settle all the questions involved in the suit, and that the learned Judge was wrong in holding that the law in this country allowed no discretion to the Court to add her name as a party-respondent.

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*Mr. Hill* (*Mr. W. Gregory* with him) on behalf of the appellant. The Lower Court has held that it has no jurisdiction to allow the lady to intervene. Under the law in England she would be allowed: if the law is different in India, then the lady will have no chance of clearing her character. In s. 11 of the Indian Divorce Act some words have been omitted which appear in the corresponding section (s. 28) of the English Divorce Act (20 and 21 Vict. cap. 85). There being this omission in the Indian Act, it was held that the lady could not be made a party; but in s. 45 of the Act it is provided that all proceedings under the Act between party and party shall be regulated by the Code of Civil Procedure, which means not only proceedings between the parties already on record, but all persons who ought to be or are entitled to be made parties.

[MACLEAN C.J. The only question is whether the Court has jurisdiction or not. Do you suggest we have power under s. 32 of the Code?]

I put it on two grounds, viz., s. 32 of the Code and also s. 7 of the Indian Divorce Act. It was unnecessary to give the power which the English Act does by s. 28 of that Act. The Indian Act gives a wider power. S. 32 of the present Procedure Code corresponding with s. 73 of Act VIII of 1859 is to be construed liberally: *Nga Tha Ya v. Mi Khan Mhaw* (1). The word "and" in s. 73 of the old Code has been read as meaning "or" in *Judooputtee Chatterjee v. Chunder Kant Bhuitacharjee* (2); see also Maxwell on the Interpretation of Statutes (3rd Edition), p. 331. By s. 7 of the Indian Divorce Act the law in this country is made to run on the same lines as the English law.

Modern legislation in England is careful to protect women against any slur on their chastity. The Slander of Women Act (1891), 54 and 55 Vict. c. 51, has abolished the need of showing special damage in case of "words which impute unchastity or

(1) (1870) 5 B. L. R. 371, 379.

(2) (1868) 9 W. R. 309, 310.

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adultery to any woman or girl"—Pollock on Torts (6th Edition), p. 239. The law is similar in this country—Alexander on Torts (4th Edition), p. 260. But in the present case the lady will have no redress for the charges made against her, unless she is made a party.

Divorce proceedings are of a peculiar character: there may be collusion or connivance; there are no King's proctors in this country. The Court should have every help to come to the truth. There are two reasons why an alleged adulterer is made a party—(a) that he may protect himself, and (b) public policy which requires that divorces should not be lightly granted—*Fisher v. Keane*(1), *Carryer v. Carryer*(2), *Wheeler v. Wheeler and Rhodes*(3), *Jones v. Jones*(4), *Bell v. Bell*(5). S. 15 of the Indian Act corresponds with s. 2 of the English Act of 1866 (29 and 30 Vict. c. 32). In *Stevenson v. Stevenson*(6) Sale J., in a wife's suit for divorce, allowed a person charged by the husband with committing adultery with his wife to intervene. That having been done in a wife's suit, must have been done under s. 32 of the Procedure Code. S. 45 and s. 7 of the Divorce Act give ample power, and unless the Court is actually debarred, it ought to struggle to make the applicant a party, so that she may not lose her character without being heard.

*Mr. Garth* on behalf of the petitioner respondent. The Indian Divorce Act was passed on the same lines as the English Act; but if s. 11 of the Indian Act be compared with s. 28 of the English Act, it will appear that the discretionary power given to the Court by the latter has been omitted in the former.

[MACLEAN C.J. May it not be said that section 73 of the old Procedure Code (Act VIII of 1859), corresponding with section 32 of the Code of 1882, was incorporated into the Indian Divorce Act by section 45 of the Act?]

The language of s. 45 has nothing to do with the question of parties: it refers to the proceedings to be followed. There is a separate provision in the Act, *viz.*, s. 11, for adding parties by which the alleged adulterer is made a necessary party,

(1) (1878) L. R., 11 Ch. D. 353.

(2) (1865) 34 L. J. Mat. 47.

(3) (1889) L. R. 14 P. D. 154, 156.

(4) [1896] P. 165, 169.

(5) (1883) L. R. 8 P. D. 217.

(6) (1899) 4 C. W. N. 506.



but a person in the position of the applicant is not. The issue in this case is whether the respondent Boyle committed adultery. The applicant will not be legally affected by the decision in this suit; she may be socially and indirectly injured. But a party likely to be indirectly injured is not a necessary party—*Moser v. Marsden*(1). In *Bell v. Bell*(2) the Court, acting under s. 28 of the English Act, described the application as “an unusual application.” [MACLEAN C.J. Under what authority did Sale J. in *Stevenson v. Stevenson*(3) allow the alleged adulterer to intervene?] His Lordship acted under s. 15 read with s. 11 of the Divorce Act, and not under s. 45.

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[RAMPINI J. I refer you to the words “act and give relief” in section 7 of the Indian Divorce Act.] It has been held in *Abbott v. Abbott*(4) that s. 7 applies to the general rules for the guidance of the Court and not to points of procedure.

[MITRA J. The Court has to decide whether there is connivance or collusion before making decree *nisi*. The applicant would be allowed to come in after decree *nisi*; why should not she be allowed to come in before: she is interested in the result?]

The Legislature has thought fit not to give the discretionary power which there is under the English Act. Mr. Hill's arguments would be very good arguments in the Council Chamber of the Legislature, but not here.

*Mr. Hill* in reply. Mr. Garth takes a very light view of the decision in this suit upon the reputation of the applicant. The case of *Moser v. Marsden*(1) deals with patents: a divorce suit is very different from other suits, as pointed out by Gorell Barnes J. in *Jones v. Jones* (5).

[MACLEAN C.J. What do you say to Mr. Garth's argument on section 45 of the Act?]

A liberal construction should be put upon that section, as was pointed out by Norman J. in *Nga Tha Yu v. Mi Khan Mhaw* (6) with regard to section 73 of the Procedure Code of 1859. A similar application was made by a lady in *Connemara v. Connemara*(7).

(1) [1892] 1 Ch. 487.

(4) (1869) 4 B. L. R. (O. C.) 51.

(2) (1883) L. R. 8 P. D. 217.

(5) [1896] P. 165, 169.

(3) (1899) 4 C. W. N. 506.

(6) (1870) 5 B. L. R. 371, 379.

(7) [1892] P. 102.

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**MACLEAN C. J.** In this case the petitioner, Mrs. Boyle, filed a petition for divorce against her husband, on the ground of incestuous adultery with her sister, Mrs. Ramsay, the present appellant. In the Court below Mrs. Ramsay applied that she might be at liberty to intervene in the proceedings as a party respondent, to enter appearance and appear at the hearing, to examine witnesses on her own behalf, to cross-examine the witnesses who might be called for the petitioner, and to be heard by Counsel.

Mr Justice Henderson, following a decision of Mr. Justice Jenkins in an unreported case of *Bailey v. Bailey*(1), held that he had no power to grant the application, and dismissed it with costs. Hence the present appeal.

The first question is, whether the Court has power to grant the application; and, secondly, if it has that power, whether it ought to have exercised it. It is clear that under the Indian Divorce Act (Act IV of 1869) no such power is expressly given, and in this respect—a very important respect—it differs from the English Divorce Act (20 and 21 Vic. Chap. 85), though in a great measure the Indian Act is moulded upon the English Act. Under section 28 of the latter Act, upon every petition presented by a wife for dissolution of marriage, the Court, if it see fit, may direct that the person with whom the husband is alleged to have committed adultery be made a respondent. No such discretionary power is vested in the Court under the Indian Act, and it is not for us to say why it was excluded by the Legislature from that Act. In *BeU v. BeU*(2) the Court acted under that section, though the late Lord Hannen, whose experience in those matters was almost unrivalled, said that it was “an unusual application.”

We start, then, with the extremely important feature that no power to allow such intervention is directly given by the Indian Divorce Act. Whence, then, arises the power? It is contended that it is indirectly given by the combined effect of section 45 of that Act and section 32 of the Civil Procedure Code. At the time of the passing of the Indian Divorce Act the Code of Civil Procedure then in force was Act VIII of 1859, and

(1) See, *ante* p. 420 (note).

(2) (1883) L. R. 8 P. D. 217.

section 73 was the section which provided for making persons not before the Court parties to the suit. That section is now represented by section 32 of the present Code of Civil Procedure. There is, however, much force in Mr. Garth's argument that the words—"All proceedings under this Act between party and party" in section 45 apply only to proceedings after the parties to the suit have been determined, and that the parties can only be determined in accordance with the provision of that particular statute and especially of sections 10 and 11. If his argument be well founded—and I am disposed to think that it is—section 32 of the Code cannot assist the present appellant inasmuch as it would not apply to the case of substitution, dismissal, or addition of parties in divorce proceedings.

But even if it were otherwise, the present case does not fall within section 32. The real issue between the parties in the case is whether the husband has committed adultery with the present appellant, and it would be difficult to say that her presence before the Court is necessary, in order to enable the Court effectually and completely to adjudicate upon and settle that issue.

Nor do I think that section 7 of the Indian Divorce Act, which, according to the case of *Abbott v. Abbott*(1), does not apply to procedure, can assist the appellant. It would be an odd result if the power of making a respondent the person with whom the husband is alleged to have committed adultery, and which is expressly given in the English Act, but is not inserted in the Indian Act, could be said to have been given by implication by section 7 of the latter Act. I cannot accept this view.

The appellant, no doubt, may be very seriously affected by an adverse determination of the issue I have referred to, and she may consider and properly consider it a hardship that she is not allowed to come in to defend herself; but the law does not give us any discretion in the matter, nor any power to accede to her application. There is every force in the terse and pointed observation of Lord Lindley in the case of *Lowe v. Lowe*(2), where His Lordship says in a case analogous in principle to the present "that a most grievous injustice is done to a person whose conduct is being investigated under the publicity of modern times where he is not able to say a word

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(1) (1869) 4 B. L. R. (O.C.) 51.

(2) [1899] P. 204.

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in his defence That, however, is a question for the Legislature—not for us.”

The appeal must be dismissed with costs.

**RAMPINI J.** I agree.

**MITRA J.** I agree.

Attorneys for the applicant: *Messrs. Sanderson & Co.*

Attorneys for the petitioner: *Messrs. Leslie and Hinds.*

S. C. B.

## APPELLATE CIVIL.

1903  
 March 30.

**KIRON CHUNDER ROY**

v.

**NAIMUDDI TALUKDAR.\***

*‘Lease of land’—Revenue sale Law (Act XI of 1859) s. 37, cl. 4—‘Permanent building.’*

The word ‘lease’ in sub-s. 4 of s. 37 of Act XI of 1859 does not mean a lease from the zemindar only.

SECOND APPEAL by the plaintiffs, Kiron Chunder Roy and others.

This appeal arose out of an action brought by the plaintiffs to recover *kh<sup>as</sup>* possession of two plots of land on a declaration of their zemindari right thereto, and non-existence of any under-tenure of the defendants. The allegation of the plaintiffs was that on the 10th January 1888, Zemindari No. 3842 was sold for arrears of Government revenue and was purchased by the plaintiff No. 1 and Upendra Chunder Roy in the name of one Kali Krishna Bose; that they took possession of the property; that a deed of release having been executed by the *benamdar* in their favour, their servant went to take rent and *kabuliats* from the

\* Appeal from Appellate Decree No. 1828 of 1900, against the decree of A. Goodeve, Officiating District Judge of Jessore, dated the 25th of May 1900, reversing the judgment and decree of Debendra Lal Shome, Subordinate Judge of Khulna, dated the 2nd of March 1900.

*karsha* raiyats, but was opposed by the defendants; that they having purchased the zemindari free of incumbrances, the defendants' under-tenure, if any, could not stand as against them. The defence of some of the defendants was, that the plaintiffs had no cause of action against them, they having no under-tenure in the disputed land. And that of the others was, *inter alia*, that the plaintiffs had no cause of action and right of suit; that a part of plot No. 1 was the *karsha* of Runjit Khan, a maternal uncle of the defendants, which was held by them for a long time, and that the remaining portion of the said plot was held and enjoyed by them as *khamar*, from time immemorial, by cultivating the same and by dwelling thereon.

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The Court of First Instance decreed the plaintiffs' suit in part, and declared that the plaintiffs were entitled to get *khas* possession of that part of plot No. 1 on which the garden and tanks did not stand, and of the whole of plot No. 2. The material portion of his judgment was as follows:—

"From the evidence on both sides it has been proved that on plot No. 1 there is a garden, tank and homestead. The homestead, that is, the dwelling-house, must according to section 37, Act XI of 1859, be a permanent building. As, according to defendant No. 25, some tin sheds and cottages formed that dwelling-house, they do not come under the dwelling-house, which is protected from removal under that section. The lease of the land on which those tin sheds and cottages stand are not therefore legally protected from avoidance.

"The lease of the land on which the garden and tank stand is protected from cancellation. If clause 4, s. 37 be strictly construed, it follows that the whole of the two plots which form one lease, is protected from the plaintiff's claim for *khas* possession. In my opinion the meaning of that clause is that, that portion of land on which gardens and tanks stand should be exempted from the claim."

On appeal the District Judge of Jessore held that the defendants-appellants were protected by their lease from ejectment from both the plots of land in dispute; and he accordingly allowed the appeal. Against that judgment the plaintiffs now appealed.

*Senior Government Pleader (Babu Ram Charan Mitter)* for the appellants contended that the lease that was produced in the case, was not a lease granted by the defaulting proprietor. "Lease" in cl. (4), s. 37 of Act XI of 1859, means a lease by the proprietor; and the nature of the "dwelling-house" contemplated therein must be of a permanent character. The

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lease in this case was granted by a tenure-holder, and it therefore does not come within the purview of that section.

*Dr. Ashutosh Moolerji and Babu Jodu Nath Kanjilal* for respondents were not called upon.

**MACLEAN C. J.** I do not think we can interfere in this case. I am not disposed to accept the view of the learned Government Pleader that a lease in sub-section 4 of section 37 of Act XI of 1859 can only mean a lease from the zemindar. There is no such qualification in the section. It only says "leases of lands whereon, &c.;" and, in the present case there is undoubtedly a lease of land. I am not disposed to think that a tin shed is a "permanent building" within the meaning of the section. The inclination of my opinion is the other way: but it has been found here that there are gardens and tanks on the land, and that there is only one lease covering the whole land in dispute, and that being so, it seems to me that the lessees have brought themselves within the exception.

The appeal, therefore, must be dismissed with costs.

**MITRA J.** I concur.

*Appeal dismissed.*

S. C. G.

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## MAHOMED ALI AMJAD KHAN

v.

## SECRETARY OF STATE FOR INDIA.\*

1908

April 1,

*Decree—Court-fee—Memorandum of appeal, valuation of—Land Acquisition Act (I of 1894), suit under—Court-fees Act (VII of 1870) ss. 8, 11.*

In cases under the Land Acquisition Act (I of 1894), the decree awarded in appeal must be limited to the amount for which court-fee has been paid on the memorandum of appeal.

APPEALS by the plaintiff, Mahomed Ali Amjad Khan.

These appeals arose out of the proceedings taken under the Land Acquisition Act. The Government acquired two plots of land in the town of Sylhet, belonging to the plaintiff. Up to 1897 there was a bungalow on each of these plots, both of which used to be occupied by European officials. After an earthquake these bungalows having fallen down, the Government acquired these two plots of land. The District Judge of Sylhet allowed compensation at a certain valuation. The plaintiff appealed to the High Court against the decision of the District Judge, claiming compensation at a higher rate than allowed by the learned Judge, and, for the purposes of court-fee, valued one of the appeals at a sum lower than what he could have got, if the decree of the Lower Court were varied by the Appellate Court.

On the 25th of November 1902, these appeals came on for hearing before a Division Bench (PRINSEP and STEPHEN JJ.) of this Court.

*Babu Rajendra Nath Bose* and *Dr. Ashutosh Mookerjee* for the appellants.

*Senior Government Pleader (Babu Ram Charan Mitter)* for the respondent.

[On the 4th of February, 1903, judgment was delivered in these appeals; and with respect to appeal No. 87, judgment was given for an amount more than what had been claimed by the appellant in his memorandum of appeal. The learned Government Pleader

\* Appeals from Original Decrees Nos. 66 and 87 of 1900, against the decrees of B. V. Nicholls, Offg. District Judge of Sylhet, dated Nov. 17, 1899.

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brought this fact to the notice of the Hon'ble Judges who delivered the judgment, and submitted that the decree should be limited to the amount claimed in the memorandum of appeal, for which court-fee had been paid. Thereupon, their Lordships desired the vakil for the appellant to present an application offering to pay in the deficit court-fee. The application was accordingly made on behalf of the claimant, and the senior Government Pleader also put in an application for the Secretary of State. The Court then hearing both sides supplemented the judgment, passed on the 4th of February 1903, as follows:—]

**PRINSEP AND STEPHEN JJ.** It was not pointed out to us, when delivering the judgment in these cases, that the amount found to be due to the appellant in appeal No. 87 on the calculation made, was more than what he had claimed in his memorandum of appeal. If that had been pointed out at the time we delivered judgment, the amount what we were prepared to decree would have been reduced. We find now that, in his memorandum of appeal, the proprietor of the land, taken by the Government, has estimated the value of the amount which he considers due to himself for the purposes of court-fee, at a sum lower than what has been allowed him in the calculation made by us.

The Court-fees Act, in allowing a sum in excess of the amount claimed, limits it to certain suits, and amongst those we do not find a suit of this description specified in section 11 of the Court-fees Act. On the other hand, we find that section 8 of that Act lays down the principle on which court-fees should be calculated on the memorandum of appeal in a case of this description, and applying this principle to the present case, we find that the appellant in appeal No. 87 claimed only Rs. 438, whereas by the terms of our decree, he has obtained Rs. 1,084-6. We think, therefore, that the decree must be limited to the amount at which the memorandum of appeal has been valued, and that the decree previously made will accordingly be so far modified as to allow the appellant the amount claimed in the memorandum of appeal, *viz.*, the sum of the Rs. 438 over and above the amount given him by the District Judge.

*Decree modified.*

S. C. G.



## NRITTA KUMARI DASSI

v.

## PUDDOMONI BEWAH.\*

1903

April 18.

*Prescription—Beneficial enjoyment of the dominant owner—Cornice projected over another's land, as ornamentation—Indian Easements Act (V of 1882).*

There can be no prescriptive right to a projection which has been erected merely for the purpose of ornamentation.

*John George Bagram v. Khettranath Karformah* (1) referred to.

SECOND APPEAL by the plaintiffs, Nritta Kumari Dassi and others.

This appeal arose out of an action brought by the plaintiffs for removal of a wall built by the defendants and for restoration of a cornice to its former state. The allegation of the plaintiffs was that their house and the defendants' house, which were both one-storeyed, stood side by side, but their house was a cubit higher than that of the defendants, and about 6 inches of the cornice of the roof of their house projected over the roof of the defendants' house; that the defendants built a second storey over their house, and in consequence thereof a wall of the second storey interfered with the cornice which projected over the lower storey of the defendants' house for many years. The defence of the defendants mainly was that, inasmuch as they built upon their own land, the plaintiffs could not compel them to remove the wall. The Court of First Instance decreed the plaintiffs' suit. On appeal the Subordinate Judge of 24-Pergunnahs reversed the decision of the first Court.

*Dr. Ashutosh Mukerjee* (*Babu Jnanendra Nath Bose* with him) for the appellants. The Court below has erroneously held that no easement can be acquired, as the cornice projected, not over vacant land, but over the defendants' roof: see *Mohankal Jechand v. Amratal Becharadas*(2). No issue was raised in the Court

\* Appeal from Appellate Decree No. 2108 of 1900, against the decree of Karuna Das Bose, Subordinate Judge of 24-Pergunnahs, dated July 16, 1900, reversing the decree of Soshi Bhusan Chowdhry, Munsif of Alipore, dated Aug. 28, 1899.

(1) (1869) 3 B. L. R. (O. C.) 18, 47. (2) (1878) I. L. R. 3 Bom. 174.

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below as to whether the cornice was beneficial to the dominant tenement: that question should have been gone into. No doubt, under the English law an easement must be beneficial: see Gale on Easements, 7th Edition, page 6; and *John George Bagram v. Khetttranath Karforma*(1).

No one appeared for the respondents.

RAMPINI AND MITRA JJ. This is an appeal against the judgment of the Subordinate Judge of the 24-Pergunnahs, dated the 16th of July 1900. The action is one of a somewhat unusual nature. The plaintiff seeks to restrain the defendant from maintaining a wall which he has erected in the course of the construction of a second storey to his house. The plaintiff says that this wall interferes with a cornice of his house which has projected over the lower storey of the defendant's house for many years, and that he should have the wall, which the defendant has erected so as to "absorb" or include his cornice, removed and broken down.

The Subordinate Judge has found as fact that the cornice of the plaintiff's house has projected to the extent of 6 inches in width over the defendant's lower storey for a considerable period, more than the period necessary for the establishment of an easement, provided such an easement as the plaintiff claims can be acquired. But he has held that no such right can be gained by prescription, inasmuch as this cornice which projects over the defendant's house is not necessary for the protection of the plaintiff's property, but has been constructed on the plaintiff's house merely for the purpose of ornamentation. He says in his judgment: "One fundamental principle of the right to an easement is that it confers some benefit on the person who claims the easement, and does not serve merely a purpose of ornamentation." The plaintiff now appeals against this order of the Subordinate Judge.

We have given this case our best consideration, and, on the whole, we see no reason to interfere with the order of the Subordinate Judge dismissing the plaintiff's appeal to him, and we think that he has laid down the law as to easements perfectly

(1) (1869) 3 B. L. R. (O. C.) 18.

correctly. We find in the Indian Easements Act (Act V of 1882), which, of course, is not in force in this province, but which we think may be referred to as an authority on the subject as to what an easement in India is, it is laid down that "an easement is a right which the owner or occupier of certain land possesses, as such, for the *beneficial enjoyment* of that land to do and continue to do something," and so on. Then, we find it laid down in Gale on Easements, 7th edition, page 6, that "an easement is a privilege without profit, which the owner of one neighbouring tenement hath of another, existing in respect of their several tenements by which the servient owner is obliged to suffer or not to do something on his own land, for *advantage* of the dominant owner." Thus, it appears from these authorities that there can be no prescriptive right to a projection which has been erected merely for the purpose of ornamentation.

We find this also laid down in the case of *John George Bagram v. Khattranath Karformah*(1), in which Chief Justice Peacock has pointed out that there is no prescriptive right to anything which is "a mere matter of delight and not a matter of necessity." In these circumstances we think that this case has been rightly decided. The plaintiff's cornice, which no doubt projected over the defendant's land for some time, is not a subject with regard to which an easement can be acquired by the plaintiff. The defendant has clearly a right to the enjoyment of his land *usque ad cælum* unless the plaintiff can establish a prescriptive right to project his cornice over it. In our opinion he cannot successfully do so, and this appeal must be dismissed with costs.

S. C. G.

Appeal dismissed.

(1) (1869) 3. B. L. R. (O. C.) 18, 47.

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# RADHARAMAN MUNSHI

v.

## SURNOMOYI DEBI.\*

*Interest—Mesne profits, interest on—Civil Procedure Code (Act XIV of 1882)  
 s. 211.*

Regard being had to the provisions of s. 211 of the Civil Procedure Code (Act XIV of 1882) in the ascertainment of mesne profits due to the decree-holder, he is entitled to receive interest, year by year, on the amount found to be due.

*Hurre Durga Chowdhuri v. Surut Sundari Debi*(1) distinguished.

**APPEAL** by Radha Raman Munshi, decree-holder.

On the 4th May 1901 the decree-holder applied to the Additional Subordinate Judge of Pubna and Bogra for the appointment of a commissioner to deliver possession of the land in respect of which he obtained a decree against Surnomoyi Debi and others and to ascertain mesne profits. A commissioner was appointed, who submitted his report on the 9th August 1901. Both the decree-holder and the judgment-debtors objected to the commissioner's report on various grounds. The learned Additional Subordinate Judge, having disposed of all the objections as to mesne profits, observed as follows:—

“Lastly, it is contended on behalf of the decree-holder that interest should be allowed year by year on the yearly profits as part of the *wasilat*. But having regard to the number of years for which mesne profits are claimed, and to other circumstances of the case, I decline to award interest year by year on the yearly profits, before the ascertainment of the exact amount thereof. I will, however, allow interest at 6 per cent. per annum from this date.”

Against this order disallowing interest on the mesne profits of each year, the decree-holder appealed to the High Court.

*Babu Golap Chunder Sarkar* for the appellant.

*Babu Taruck Chunder Chuckerbutty* for the respondent.

**PRINSEP AND STEPHEN JJ.** The question raised in this appeal is whether, in the ascertainment of mesne profits due to the

\* Appeal from Order No. 100 of 1902, against the order of Jogendra Chandra Moulik, Additional Subordinate Judge of Pubna and Bogra, dated Nov. 26, 1901.

(1) (1881) I. L. R. 8 Calc 332; L. R. 9 I. A. 1.

decree-holder, appellant, he was entitled to receive interest, year by year, on the amount found to be due.

The Subordinate Judge has refused to give him interest on such a calculation, and has given interest only on the amount actually ascertained and embodied in the decree. The case of *Hurro Durga Chowdhurani v. Surut Sundari Debi* (1) has been cited by the learned pleader for the respondent as authority for this order. On the other hand, the learned pleader for the appellant draws our attention to section 211 of the Code of 1882, which was enacted after the judgment of their Lordships of the Privy Council, in the case just mentioned, in which mesne profits are defined to mean "those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, *together with interest on such profits.*" We find that the previous Code of 1877 for the first time defined mesne profits and that, in that definition the last words, *viz.*, "together with interest on such profits," did not appear, and it was in accordance with the terms of that Code that the judgment of their Lordships of the Privy Council was pronounced. It seems to us that these words, which have since been embodied in this definition, should receive some express meaning. They clearly do not refer to interest due after the ascertainment of the amount of the mesne profits due under the decree, because the Courts have been given a discretion to award interest separately on the amount so ascertained. The words, therefore, seem to us to contemplate that interest should form a separate item in the calculation of the amount due as mesne profits, and in this view, we modify the order of the Subordinate Judge and direct that he allow interest at the rate of twelve per cent. per annum, year by year, on the profits before the ascertainment of the actual amount of such mesne profits under the decree. We observe that the Subordinate Judge has given interest on the amount so ascertained regarding which no appeal has been made.

S. C. G.

(1) (1881) I. L. R. 8 Calc; 382, L. R. 9 I. A. 1.

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# CRIMINAL REVISION.

1902  
 Nov. 4, 19.  
 Dec. 1.

SURJYA KANTA ACHARJEE

v.

HEM CHUNDER CHOWDHRY.\*

*Jurisdiction—Criminal Procedure Code (Act V of 1898) ss. 145, 355, 356—  
 Witness, attendance of—Process, refusal to issue—Magistrate, discretion of—  
 High Court, power of interference by—Charter Act (24 and 25 Vict., C. 104),  
 s. 15—Proceedings under Chapter XII of the Criminal Procedure Code.*

Where the refusal by a Magistrate to assist one of the parties to a proceeding under Chapter XII of the Criminal Procedure Code, in procuring the attendance of his witnesses, deprived that party of a hearing on the only question for the determination of the Court and so amounted to a denial of justice:—

*Held*, that the Magistrate in refusing process acted without jurisdiction.

*Madhab Chandra Tanti v. Martin†* referred to.

The High Court in the exercise of general powers of supervision vested under 24 and 25 Vict., C. 104, s. 15, has power to interfere in a case like this, even if it cannot, in strictness, be said that the Magistrate acted without jurisdiction.

A mere refusal, however, to summon or examine a particular witness or witnesses cited by a party, in proceedings under Chapter XII of the Criminal Procedure Code, is not necessarily a ground for interference by the High Court.

It cannot be laid down as a rule of law that proceedings under Chapter XII of the Criminal Procedure Code should be regarded, as to procedure, as summons cases.

*Harendra Narain Singh Chowdhry v. Bhobani Prea Baruani* (1) and *Ram Chandra Das v. Monohur Roy* (2) explained.

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\* Criminal Revision No. 805 of 1902, against the order passed by Nikhil Nath Roy, Subdivisional Officer of Netrokona, dated May 17, 1902.

† MADHAB CHANDRA TANTI v. MARTIN.(a)

In this case a Rule was obtained by the petitioners, Madhab Chandra Tanti and others, calling upon the District Magistrate of Bardwan to show cause why the order under s. 145 of the Criminal Procedure Code should not be set aside on the ground that the Magistrate should have allowed summons to issue on the witnesses cited by the petitioners on the 7th October 1901, notwithstanding the reasons given by him for refusing to do so.

(a) Criminal Revision No. 1157 of 1901.

(1) (1885) I. L. R. 11 Calc. 762.      (2) (1893) I. L. R. 21 Calc. 29.

RULE granted to the petitioner, Surjya Kanta Acharjee.

This was a Rule calling on the District Magistrate of Mymensingh to show cause why the order under s. 145 of the Criminal Procedure Code, dated the 17th May 1902, passed by the Subdivisional Magistrate of Netrokona, declaring the first party to be in possession, should not be set aside, on the ground that the Magistrate had refused to issue process to compel the attendance of the witnesses of the petitioner who was the second party.

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On the 2nd April 1902 the Subdivisional Magistrate of Netrokona, on the basis of a police report, instituted proceedings under s. 145 of the Criminal Procedure Code against the first and second parties, and directed summonses to issue to certain witnesses mentioned in the police report, who, however, were not witnesses named by the parties. The case was fixed for hearing on the 16th April, but it being found on that day that the parties had not filed their written statements, the case was adjourned till the 8th May, on which day the evidence of two witnesses for the first party was taken.

On the 28th April, the petitioner put in a list of thirty-one witnesses and applied for process to compel their attendance, but owing to his having paid only Re. 1-8 as process fee, summonses were issued only against five of the witnesses and these were duly served.

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*Mr. Hill and Babu Dasarathi Sanyal* for the petitioners.

*Mr. Jackson and Babu Sarat Chunder Roy Chowdhry* for the opposite party.

PRINSEP AND HENDERSON JJ. The Rule will be made absolute, but only on one point, and that is, that the Magistrate acted without jurisdiction in refusing on the 7th October to issue process for the attendance of the witnesses cited by the petitioners. No doubt the petitioners were somewhat late in applying for process, but still there was ample time to serve these processes, so as to obtain the attendance of the witnesses, and the proper order for the Magistrate to have made was not to refuse process on the ground that there was not sufficient time, but to allow the petitioners' application for the processes on the distinct understanding that unless they were served within sufficient time to enable the witnesses to appear, no further time will be allowed, but the matter would be peremptorily taken up on the 10th October—the date fixed for the final order. The Magistrate must allow process for the attendance of these witnesses and then proceed to deal with the case before him.

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On the 8th May none of the petitioner's witnesses attended Court, and he made an application praying that, as their evidence was material, process might be issued for their attendance. The Magistrate then passed the following order:—

“They must bring evidence themselves. These witnesses will be examined as soon as those on behalf of the first party have been.”

The examination of the witnesses for the first party was concluded on the 12th May, and the case was adjourned until the following day. On the case being resumed on the 13th May, the petitioner again applied to the Magistrate, stating that his witnesses had not attended, and asked that process might be issued on payment of costs for their attendance. On that application the Magistrate passed the following order:—

“The witnesses for the first party have been examined and their case closed. Applicant should have taken steps earlier to procure the attendance of these witnesses. Applicant must bring his witnesses to-morrow.”

On the 14th May the petitioner, finding it impossible to produce his witnesses without process, applied again for process, whereupon the Magistrate passed the following order:—“File with the record;” and after hearing the pleaders for both sides adjourned the case for judgment to the 17th May, on which day the Magistrate having held that there was no evidence from the petitioner's side to rebut the evidence on the record, declared the first party to be in possession.

*Babu Joy Gopal Ghosh* for the petitioner. In this case the action of the Magistrate was without jurisdiction, inasmuch as no opportunity was given to the petitioner to adduce evidence. The orders passed on the several applications asking for processes against the witnesses do not show any good reasons for their refusal. It has been repeatedly held that the Magistrate, having once issued processes for the attendance of witnesses, is bound to assist the party in enforcing such attendance. Here the applications were repeated and the petitioner acted with due diligence; it was beyond his power to bring his witnesses without the assistance of the Court, and that assistance was refused. The order passed on the last application was simply “file”; that was not the proper way to deal with the application, as has been frequently pointed out by this Court. Section 145 of the Code is



peremptory so far as regards the taking of evidence offered by a party. The words used are "shall take all the evidence." Therefore refusal to take evidence would be acting without jurisdiction, and I submit the refusal by the Court to help a party to obtain his evidence by enforcing the attendance of his witnesses is equally acting without jurisdiction.

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*Babu Jogesh Chandra Roy* for the opposite party. The procedure adopted in cases under s. 145 is that prescribed for summons cases, and an absolute discretion is given to the Magistrate by s. 244 of the Code to refuse to issue processes for witnesses: see *Hurendro Narain Singh Chowdhry v. Bhobani Prea Baruani*(1) and *Ram Chandra Das v. Monohur Roy*(2). There is no question of jurisdiction in the present case, and this Court should not interfere.

*Babu Joy Gopal Ghosh* in reply. There is nothing in the Code which says that the procedure to be followed in cases under s. 145 is that provided for summons cases. Sections 355 and 356 of the Code show there is a distinction to be drawn between summons cases and cases under s. 145. The High Court has jurisdiction to interfere where the Magistrate has acted arbitrarily, as in this case: see the case of *Madhab Chandra Tanti v. Martin*(3), in which the order of the Magistrate was set aside on exactly the same ground.

**STEPHEN AND HENDERSON JJ.** In this case a Rule was granted calling upon the Magistrate and the opposite party to show cause why an order under section 145 of the Criminal Procedure Code declaring the first party to be in possession should not be set aside on the ground that the Magistrate had refused to issue process to compel the attendance of the witnesses of the petitioner who was the second party.

The facts are not disputed. On the 2nd April 1902, the Deputy Magistrate, on the basis of a police report, instituted proceedings under section 145 of the Criminal Procedure Code, and directed summons to issue to the witnesses mentioned in the police report, fixing the hearing for the 16th April. The witnesses

(1) (1885) I. L. R. 11 Calc. 762.

(2) (1898) I. L. R. 21 Calc. 29.

(3) See *ante*, p. 508 (note).

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so mentioned were not, so far as appears, the witnesses put forward by the parties, and it is not shown whether they were served or not. On the 16th April, the parties not having filed their written statements, the case was adjourned, and the Magistrate made an order that the witnesses present, if any, should give recognizances of Rs. 20 each. On the 16th April the case was again postponed until the 8th May, on which day the parties filed their written statements, and the evidence of two witnesses for the first party was recorded. In the meantime the petitioner, on the 28th April, had put in a list of 31 witnesses and applied for process to compel their attendance. The order made upon the application is not quite intelligible. It was as follows: "Issue summons if there is orders." With the application the petitioner deposited Re. 1-8 as costs for all the witnesses. In his explanation the District Magistrate states that as only Re. 1-8 was paid as process fee for all these (31) witnesses, summons only issued against five of these witnesses, and they were duly served. The District Magistrate assumes that, "it is clear from the fact that as only Re. 1-8 was paid, the petitioner wished summons to issue only against the five, and intended to bring the others himself." He admits that on the 8th May none of the petitioner's witnesses attended, and he states that no application for further process was made that day. The latter statement appears to be incorrect, for we find that on the 8th May the petitioner made an application alleging that none of the witnesses cited by him had appeared, and praying that as their evidence was material, process might be issued for their attendance. The Deputy Magistrate passed the following order upon the application:—

"They must bring evidence themselves. These witnesses will be examined as soon as those on behalf of the first party have been."

The examination of the witnesses for the first party was continued on the 9th, 10th, and 12th May, and the case then adjourned until the 13th May. On that day the petitioner again applied that process might be issued on payment of costs for the attendance of his witnesses, of whom he gave a list, and he stated that they had not appeared and that their evidence was very material. On that application the Deputy Magistrate passed the following order:—

"The witnesses for the first party have been examined and their case closed. Applicant should have taken steps earlier to procure the attendance of these

witnesses . . . Applicant must bring his witnesses to-morrow." [That is, the 14th May.]

On the 8th May, when the petitioner applied for summons for his witnesses, there was apparently ample time to procure their attendance, but the Magistrate then refused the application, directing that the petitioner should bring his own witnesses. Considering that the petitioner had stated he was unable to bring his witnesses without the assistance of the Court, it was unreasonable to refuse his application. It was not suggested then that the application was too late. As a matter of fact, the petitioner had previously on the 28th April applied for process against 31 witnesses, and we do not think that it was right to assume from the fact that an insufficient sum had been deposited that he only required the attendance of 5 out of the 31 witnesses named. Even the 5 on whom summons was issued and served did not appear.

The affidavit on which the Rule was granted states that on the 14th May it had been found impossible to produce any witness without process. On that day another application was made alleging that the witnesses would not attend without summons and asking for process. Upon this application the Magistrate merely passed the order "File with the record." We may here express our opinion that this was not the proper way to deal with the application. It was the duty of the Magistrate either to grant or refuse the application.

On the 14th May the petitioner was unable to produce any of his witnesses, and after hearing the pleaders on both sides the case was adjourned for judgment to the 17th May, when the Magistrate, holding "that there was no evidence from the other side to rebut the evidence on the record," declared the first party to be entitled to possession until ejected in due course of law.

The only question we have to determine is whether the Magistrate, in refusing to issue process to compel the attendance of the witnesses of the petitioner, acted without jurisdiction, for otherwise we are unable to interfere.

It has been contended that proceedings under Chapter XII of the Criminal Procedure Code are in matters of procedure to be regarded as summons cases. The Code nowhere declares that such

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proceedings are to be so regarded; and it is remarkable that a distinction is drawn in sections 355 and 356 between summons cases and inquiries under Chapter XII. Section 355 directs that in summons cases the Magistrate shall make a memorandum of the substance of the evidence of each witness, whereas section 356 directs that in all inquiries under Chapter XII the evidence of each witness shall be taken down in writing in the language of the Court by the Magistrate, or in his presence or hearing, or under his personal direction and superintendence, and shall be signed by the Magistrate. In the case of *Hurendro Narain Singh Chowdhry v. Bhobani Prea Baruani*(1) a Division Bench of this Court stated, it was inclined to think that from their nature, proceedings under Chapter XII should be regarded on all points of procedure as summons cases, and the case was cited with approval in *Ram Chandra Das v. Monohur Roy*(2). If such proceedings are to be regarded as summons cases so far as procedure is concerned, the taking of evidence is regulated by section 244. The language of the section is not altogether appropriate to quasi-civil proceedings, such as proceedings under Chapter XII. It directs the Magistrate to take the evidence produced in support of the prosecution and by the *accused* in his *defence*; and empowers him, if he thinks fit, on the application of the complainant or accused, to issue process to compel the attendance of any witness, thus apparently leaving it in the discretion of the Magistrate to issue process or not. It has, however, been frequently held that this discretion should not be exercised to the detriment of the applicant in an arbitrary manner. It appears to us that it cannot be laid down as a rule of law that proceedings under Chapter XII of the Criminal Procedure Code should be regarded, as to procedure, as summons cases, and we do not understand that in the cases to which reference has been made the Court intended to do more than lay down a rule of convenience in a case where special provision was not made by the law. Section 145 of the Criminal Procedure Code enjoins the Magistrate "to receive the evidence produced" by the parties and to take such further evidence, if any, as he thinks necessary, but this does not, in our opinion, mean that the parties shall produce their own evidence, or

(1) (1885) I. L. R. 11 Calc. 762.

(2) (1893) I. L. R. 21 Calc. 29.

absolve the Magistrate from the duty of assisting the parties in procuring the attendance of material witnesses when it is shown that their attendance cannot be enforced without such assistance.

In the case before us, if the Magistrate had a discretion, we consider that in refusing to issue process he acted arbitrarily and without any good or sufficient reason. The arbitrary exercise of discretion does not necessarily amount to acting without jurisdiction so as to justify this Court in interfering in all cases where discretion has been arbitrarily exercised. Where, however, the refusal of a Magistrate to assist one of the parties to a proceeding under Chapter XII of the Criminal Procedure Code in procuring the attendance of his witnesses deprives that party, as in this case, of a hearing on the only question for the determination of the Court, and so amounts to a denial of justice, we think that the Magistrate, in refusing process, acts without jurisdiction. In the case of *Madhab Chandra Tanti v. Martin*(1) it was held by a Division Bench that a Magistrate in proceedings under section 145 of the Criminal Procedure Code acted without jurisdiction in refusing to issue process for the attendance of the witnesses cited by the petitioners in that case. In that case also the petitioners were unable to procure the attendance of any of their witnesses, and their opponents were consequently declared, upon the un rebutted evidence produced by them, to be in possession of the land in dispute. The circumstances of the two cases are practically the same. It may be mentioned that a member of this Bench was a party to the decision on the case referred to.

Even if it cannot, in strictness, be said that the Magistrate in the case before us acted without jurisdiction or declined jurisdiction, we consider that, having regard to the view which we entertain as to the effect of his action, the case is one in which we ought to interfere in the exercise of the general powers of superintendence vested in this Court under 24 and 25 Vict. C. 104, section 15.

At the same time, we are not prepared to say that a mere refusal to summon or examine a particular witness or particular

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witnesses cited by a party in proceedings under Chapter XII of the Criminal Procedure Code is necessarily a ground for interference by this Court. Each case must be determined upon its own circumstances.

For the reasons stated, therefore, we set aside the order complained of.

It must be left to the discretion of the Magistrate to say whether, having regard to the existence or otherwise of circumstances likely to lead to a breach of the peace, the proceedings should be dropped, or taken up again and a reasonable opportunity afforded to the petitioner to produce his witnesses with the assistance of the process of the Court, if necessary.

D. S.

## APPELLATE CIVIL.

PERCIVAL

v.

COLLECTOR OF CHITTAGONG.\*

*Court-fee—Decree—Memorandum of appeal, amendment of—Civil Procedure Code (Act XIV of 1882) ss. 53, 582—Court-fees Act (VII of 1870).*

In the generality of cases, an Appellate Court cannot pass a decree for a larger amount than that claimed in the memorandum of appeal, unless, before the judgment is pronounced, an amendment of the memorandum of appeal is allowed, and the additional court-fee paid in.

### APPLICATIONS.

THESE applications arose out of an appeal from original decree, preferred by the plaintiffs, H. Percival and others.

There were 22 references made to the Civil Court under s. 18 of the Land Acquisition Act by the Collector, and the cases were tried together by the Subordinate Judge of Chittagong. The lands were acquired for the Assam-Bengal Railway. The total

\* Applications in appeal from Original Decree No. 204 of 1897, against the decree of Jadu Nath Dass, Subordinate Judge of Chittagong, dated Feb. 22, 1897.

amount of the compensation decreed by the Subordinate Judge was Rs. 21,726-4-10. The plaintiffs Nos. 1, 2, and 5 appealed to the High Court, and the appeal being valued at Rs. 13,000, court-fees were paid for that amount.

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The appeal was heard by the High Court on the 20th July 1900, and the amount of the compensation was raised to over Rs. 40,000. After the judgment was delivered, the learned Government Pleader for the Collector of Chittagong, who was the defendant-respondent in the appeal, pointed out that the appeal had been valued at Rs. 13,000 only, and that, under the decree passed by the High Court, the appellants would get much more than that amount. This objection was not taken at the hearing; and the learned counsel who appeared for the appellants urged that if the objection had been taken at the proper time, he would have made an application for leave to amend the memorandum of appeal, or for liberty to put in additional court-fees. Thereupon the following order was passed by the High Court :—

“Under the circumstances we ought to allow the appellants leave to put in sufficient court-fee to cover the amount hereby decreed. This order is made subject to any application that the Secretary of State in Council may be advised to make.”

Accordingly, on the 23rd July 1900, an application was made on behalf of the appellants for leave to put in the additional court-fees; and an application was also made on behalf of the Government, praying that, in the circumstances of the case, the compensation awarded by the Lower Court should not be raised beyond the amount stated in the memorandum of appeal.

*Mr. Pugh and Mr. Percival* for the appellants.

*Senior Government Pleader (Babu Ram Charan Mitter)* and the *Junior Government Pleader (Babu Srish Chunder Chowdhry)* for the respondent.

**ANNE ALI AND BRET JJ.** In the Land Acquisition case (No. 204 of 1897) we delivered our judgment on the 20th of July 1900. After the judgment had been pronounced, Babu Ram Charan Mitter, the Government Pleader, called our attention to the amount of the claim stated in the memorandum of appeal. We have no doubt, from what we know of the learned

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gentleman, that had his attention been directed to the amount therein stated, he would have brought it to the notice of the Court at the earliest stage. Apparently the matter did not strike him or come to his knowledge until judgment had been delivered.

Upon his mentioning the matter, Mr. Pugh, who appeared for the appellant, objected to the question being raised at that late stage, for he contended that, had his attention been called to it at the hearing, he would have applied for leave to pay in the additional court-fee, so as to cover whatever had been found by the Court the claimants were entitled to. At the time we were under the impression that leave might be granted to the appellant to put in the extra court-fees, and that a formal application to that effect by the learned counsel for the appellant would be necessary.

With regard to the objection urged by the learned Government Pleader, we directed that the objection should be made formally by a petition, and accordingly on the 23rd July an application was made on behalf of the appellants for leave to put in the extra court-fee, and at the same time a petition was presented on behalf of the Government, stating that, inasmuch as in the memorandum of appeal, the appellants have chosen to put the amount of the claim at Rs. 13,000, the Court should not enhance the award made by the Subordinate Judge to an amount beyond that stated in the memorandum of appeal.

Upon the question of valuation, our attention was drawn to the various sections of the Court-fees Act, and in an ancillary manner, to some of the provisions of the Civil Procedure Code, but reliance was chiefly placed on the provisions of the Court-fees Act.

It appears to us that the controversy which has arisen, in consequence of the mistake, or otherwise, on the part of the appellants, and owing to the objection taken by the learned Government Pleader, after the pronouncement of the judgment, does not seem to turn upon the question of valuation so much as upon the jurisdiction of the Court to allow the appellant to amend the memorandum of appeal, or, in other words, to allow the award to be raised beyond the amount stated in the



memorandum of appeal as the amount in respect of which the appeal was brought.

It is quite clear that in the majority of cases, the plaintiff is bound by the amount of the claim which he puts forward in his plaint, excepting in certain cases provided for by the Statutes; for example, as regards claims for mesne profits. The Court has no power to make a decree in favour of the plaintiff beyond the amount of the claim stated in the plaint.

We may take one instance as an illustration. A suit is brought upon a balance of accounts, and the plaintiff, instead of claiming whatever may be found due upon the taking of accounts, stated a specific sum as the amount claimed. It does not seem to us that the Court would be entitled, without an amendment of the plaint, to award a decree for more than what is claimed. Section 53, Code of Civil Procedure, gives the Court the power of allowing the plaint to be amended at any time before judgment, upon such terms as to the payment of costs as the Court may think fit, so that the power of allowing the amendment is restricted to the time before judgment is delivered, and it would be open to the plaintiff, in the event of his stating the amount of his claim by inadvertence, or if he has not chosen to proceed upon the basis of the taking of the accounts, to ask for amendment at any time before the judgment is pronounced; but under the Code, the plaintiff is not allowed the amendment after judgment. By section 582, Code of Civil Procedure, the provisions of the Code relating to suits are made applicable to appeals, and the question for consideration is whether the principle applicable to the amount of claim mentioned in the plaint is also applicable to the amount of claim stated in the memorandum of appeal. It is of course open to the appellant to appeal for the whole amount disallowed by the Court below, or only in respect of a part thereof. He must choose his own course. It is not the duty of the respondent to bring to the notice of the appellant any omission or inadvertence on his part; and the Courts, in the generality of cases, except in cases of mesne profits and the like, which are regulated by Statutes, cannot pass a decree for a larger amount than that stated in the memorandum of appeal, and in respect of which the appeal is actually brought. Suppose, for

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instance, a plaintiff brings a suit for Rs. 50,000 in the Court below and obtains a decree for Rs. 30,000, the claim for Rs. 20,000 being disallowed. For some reason or other, the plaintiff appeals for Rs. 10,000. There is nothing to show that unless an amendment is allowed before judgment is pronounced, the Court could in appeal decree anything more than the amount for which the appeal is brought.

In this particular case, no doubt the appellants contended upon various facts, which we found partly to be well founded, for a considerable sum of money far in excess of that awarded by the Subordinate Judge and stated in the memorandum of appeal; and upon a consideration of those facts, we are of opinion that they were entitled to somewhere like Rs. 40,000.

We regret that the attention of the Court was not called to this circumstance until after the pronouncement of the judgment. It should have been done during the course of the hearing, because it might have had some bearing upon some parts of the case; but so far as this is concerned the respondent owns no duty to the appellants, but to the Court.

As the appellants made no application to us before the judgment was pronounced, we think we cannot, after delivery of judgment, allow him leave to amend his memorandum of appeal, and that under the provisions of section 582, Code of Civil Procedure, we ought to restrict our award to the amount stated in the memorandum of appeal, *plus* the amount allowed by the Lower Court, and the usual statutory allowance.

Under the circumstances, we make no order as to the costs of these applications.

M. N. R.

*Decree modified.*

## ORIGINAL CIVIL.

NOGENDRA-NANDINI DASSI

v.

BENOY KRISHNA DEB.\*

1902

Aug. 20, 21  
and 28.

*Hindu Law—Dayabhaga—Will, construction of—Idol—Bequest to Idol not in existence—Inheritance—Stridhan—Unchastity—Consanguinity—Spiritual benefit.*

A bequest to an idol not in existence at the time of the testator's death is void.

Unchastity does not debar a Hindu woman from inheriting the *stridhan* property of her female relatives.

*Ganga Jati v. Ghasita* (1) followed. *Ramnath Tolapattre v. Durga Sundari Debi* (2), *Ramananda v. Raikishori Barmani* (3) distinguished.

Under the Bengal School of Hindu law, inheritance depends on consanguinity so far as the near relatives are concerned, but in the case of remoter relations the law falls back on the principle of spiritual benefit.

ONE Chunder Kally Ghose, a Hindu inhabitant of Calcutta, died in the month of January 1897, leaving him surviving his sole widow and heiress, Sreemutty Patit Pabani Dassee. The deceased left a will dated the 29th January 1893, whereby after bequeathing certain legacies to various persons, devised and bequeathed the residue of his property, both real and personal, to Patit Pabani Dassee, and appointed her the sole executrix and trustee of his will. On the 10th April 1897, Patit Pabani obtained probate of the will.

A year later, on the 16th April 1898, Patit Pabani died childless leaving her surviving, her mother, Nogendra-Nandini Dassee the plaintiff, and her husband's eldest brother. Patit Pabani left a will dated the 4th April 1898, and appointed the defendant, Raja Benoy Krishna Deb, her sole executor.

By her will, after giving certain pecuniary legacies, Patit Pabani directed that a *Shiva Thakur* be established, and dedicated

\* Original Civil Suit No. 524 of 1899.

(1) (1875) I. L. R. 1 All. 46.

(2) (1878) I. L. R. 4 Calc. 550.

(3) (1894) I. L. R. 22 Calc. 347.

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certain property for the benefit of that idol; and she further directed that if there be any surplus of the dedicated funds, such money should be accumulated and set apart for the feeding of the poor.

On the 27th May 1898 the defendant, Benoy Krishna, proved the will of Patit Pabani Dassee, and on the 6th July 1898 obtained probate thereof. The plaintiff then instituted this suit for construction of the will of Patit Pabani for administration of her estate, and to have her rights and the rights of the defendant ascertained and declared, and for a declaration that the deceased died intestate with regard to the greater part of her property.

The defendant in his written statement alleged that the plaintiff was unchaste, and that she had an illegitimate son; and left it for the Court to determine whether the plaintiff was under the circumstances entitled to succeed to the property of the testatrix as her heiress; and that one Prosonno Kally Ghosh, the elder brother of the testatrix's husband, was the next heir in default of the plaintiff. The defendant denied the charges of maladministration of the property of the testatrix, and contended that the dispositions in the will were valid.

Two preliminary points were raised at the hearing:—

(a) Whether there was an intestacy under the will, the gift being to an idol not in existence at the time of the testator's death: and

(b) Whether unchastity on the part of a Hindu mother was a bar to the inheritance of *stridhan* property of her daughter.

*Mr. Chakravarti (Mr. J. G. Woodroffe with him)* for the plaintiff. A disposition in favour of a *thakur* or idol to be established is bad. When an idol is not in existence any gift to it cannot be a valid gift: see *Upendra Lal Boral v. Hem Chunder Boral* (1), and *Rojomoyee Dassee v. Troylukho Mohiney Dassee* (2).

In the case of an intestacy the competition can only be among the brother, father, mother and husband, but they, except the mother, being dead, the property goes to the mother: see *Shama Charan's Vyavastha Darpana*, p. 262. It is, however, alleged by

(1) (1897) I. L. R. 25 Calc. 405.

(2) (1901) I. L. R. 29 Calc. 260.

the other side that she was living in a state of unchastity at the time of the death of her daughter, and cannot therefore inherit the *stridhan* property of her daughter. I contend that on the existing authorities she can inherit. In the case of *stridhan* property the childless widow is preferred to all others. Unchastity is no bar to acquiring *stridhan* property; see *Mussamat Ganga Jati v. Ghasita*(1), which was approved of by Sale J. in the case of *Toolsee Dass Seal v. Luckhymoney Dassee*(2). According to the Dayabhaga school of Hindu Law, by which this case is governed, inheritance to *stridhan* property is determined by consanguinity on the part of the recipient, and not on the doctrine of spiritual benefit: see Mayne's Hindu Law (6th Edition), page 875, and the case of *Sarna Moyee Bewi v. Secretary of State for India*(3) and *Adevyapa v. Rudrava*(4).

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*Mr. S. Bonnerjee* (*Mr. Sinha* with him) for the defendant. The case of *Upendra Lal Boral v. Hem Chandra Boral*(5) referred to by the other side is distinguishable from the present case. The will bequeathes no property to the idol, though it is true an idol is to be established in the temple. The case of *Rojomoyee Dassee v. Troyluckho Mohiney Dassee*(6) is similar in every respect to the present case. Clause 17 of the will directs that the surplus of the testator's estate is to be employed for the keeping up of the temple directed to be built; this is a valid bequest, not being a bequest to an idol. There is an express direction in the will for the establishment of a temple, but no actual gift to an idol. I submit, therefore, that full effect can be given to the terms of the will.

*Mr. Sinha* (on the same side). The question is, how far unchastity is or is not a bar to succession to *stridhan* property. As to succession from males, not only does an unchaste wife become unable to inherit, but an unchaste daughter and an unchaste mother cannot inherit: see *Ramnath Tolapattro v. Durga Sundari Debi* (7).

(1) (1875) I. L. R. 1 All. 46.

(4) (1879) I. L. R. 4 Bom. 104.

(2) (1900) 4 C. W. N. 743.

(5) (1897) I. L. R. 25 Calc. 405.

(3) (1897) I. L. R. 25 Calc. 254.

(6) (1901) I. L. R. 29 Calc. 260.

(7) (1878) I. L. R. 4 Calc. 550.

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The doctrine of spiritual benefit does not enter into the question of *stridhan* property: *Ramananda v. Raikishori Barmani*(1). Succession to *stridhan* property in Allahabad is different from that in Bengal, and therefore the case of *Ganga Jati v. Ghasita*(2) does not apply here. If a woman cannot inherit through her son and father, can she inherit through her daughter? I submit she cannot. See Mayne's Hindu Law (6th Edition), page 878.

If a degraded woman dies leaving property, the daughter does not inherit unless in a degraded position: see *In the goods of Kamineymoney Bewa*(3) and *Sarna Moyee Bewa v. Secretary of State for India*(4). So far as this Court is concerned, the cases are uniform. As to the construction of the will, the testatrix intended that a *thakur* should be established in a temple. A temple is not inseparable from a *thakur*. Before the case of *Tagore v. Tagore*(5) no one ever imagined that there was such a rule as a gift to an unborn person being invalid. For the extension of that rule to the deity, there is no authority in Hindu law.

*Mr. Chakravarti* in reply. There is no question of degradation, for the mother is not a prostitute. The cases referred to by the other side are those in which prostitutes are parties. Unchastity is no bar to inheriting *stridhan*: *Banerjee's Hindu Law* (2nd Edition), page 344. *Mr. Justice Bannerjee* in the case of *Sarna Moyee Bewa v. Secretary of State for India*(6) goes further and holds that even in the case of a prostitute, the ordinary Hindu law of succession applies. The cases cited by the other side are all cases of inheriting from males. No Bengal authority has been cited, or can be cited, against my contention.

*Cur. adv. vult.*

Aug. 28.

**STEPHEN J.** In this case I have to decide upon the construction of the will of Sreemutty Patit Pabani Dasee, a will of which the defendant obtained probate as executor in July 1898.

Two preliminary points have been taken before me.

(1) (1894) I. L. R. 22 Calc. 347, 354.

(2) (1875) I. L. R. 1 All. 46.

(3) (1894) I. L. R. 21 Calc. 697.

(4) (1897) I. L. R. 25 Calc. 254.

(5) (1872) 9. B. L. R. 377.

(6) (1897) I. L. R. 25 Calc. 254.

It is admitted that the property affected by the will is *stridhan* property, and that the plaintiff in case of intestacy is the heiress of the testatrix as her mother.

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In the first place, I have to decide whether there is an intestacy under the will. In the next, whether, supposing there is unchastity on the part of the mother, such unchastity debars her from inheriting.

The unchastity is not admitted and no evidence is given in relation to it; but if I decide in favour of an intestacy, and if I decide that unchastity is in this case no bar to inheritance, the case need go no further.

The clauses of the will as to which it is alleged that there is intestacy are numbers 4, 5, and 6. By clause 4 it is directed that "if any spot close to the place where the funeral rites of my deceased husband were performed and the place where his remains were cremated can be purchased from the Municipality or from any other person, then a *Shiva Mandir* (temple of Shiva) and two small rooms attached thereto shall be built on that spot. Rupees 4,000 in all (shall) be spent for this (purpose). This is my desire. If the spot aforesaid be not available, then this *mandir* shall be erected at Ishwar Kashidham. A *Shiva Thakur* shall be established under the name of Chandra Nath in that *mandir*."

By clause 5 certain property is dedicated for the benefit of the said *Shiva Thakur*, and at the end of that clause it is added, "a Brahmin and *atithi* (guest) should be entertained and fed from the said money."

By clause 6 it is provided that if there is any surplus of the dedicated funds after the performance of the bequests to which I have referred, then the said money being accumulated, there should be feasting of beggars and Brahmins according to means on the anniversaries of her husband's death.

It is admitted that, according to well-known law, the bequest to the *thakur*, which was not instituted at the time of the testatrix's death, is void.

It is suggested, however, that the bequest is good so far as it refers to the building of the temple and to the other objects.

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Reading these clauses together and considering the testatrix's intention, and looking to the practical effects which such a reading of the will would produce, I cannot agree with this contention, as the institution of the *thakur* is plainly the essential bequest to which the others are only ancillary. When it fails they fail too:

I therefore hold that there is an intestacy under the clauses in question.

I may perhaps add that by clause 15 of the will Rs. 2,000 are left to the testatrix's mother, and by clause 17 it provided that her heirs are to have no title to the surplus of the dedicated money after payment of the expenses of the temple.

It remains to be considered what is the effect of the alleged unchastity of the mother.

In the first place, it appears that this unchastity has not the same legal effect as prostitution, which produces degradation and outcasting.

The difference between the two seems to be marked in the cases decided, on the one hand, *Ramnath Tolapattro v. Durga Sundari Debi*(1) and *Ramananda v. Rai Kishori Barmani* (2), and on the other *In the goods of Kamineymoney Bewah* (3).

The exact form of the alleged unchastity in the present case has not been gone into; but it is admitted that it does not amount to prostitution.

Under these circumstances I think this case is governed by the case decided in *Mussammat Ganga Jati v. Ghasita* (4) summarised by Mr. Justice Banerjee in his work on the Hindu Law of Marriage and Stridhan at page 344 as follows:—

"It was held that unchastity will not disqualify a woman from inheriting the *stridhan* of her female relatives."

It is unnecessary that I should quote further from the judgment to support this summary. I may point out that this account of the law is consistent with the cases which were cited before me. In *Ramnath Tolapattro v. Durga Sundari Debi*(5) and *Ramananda v. Rai Kishori Barmani*(6) the question was

(1) (1878) I. L. R. 4 Calc. 550.

(2) (1894) I. L. R. 22 Calc. 347.

(3) (1894) I. L. R. 21 Calc. 697.

(4) (1875) I. L. R. 1 All. 46.

(5) (1878) I. L. R. 4 Calc. 550.

(6) (1894) I. L. R. 22 Calc. 347.



one of inheritance from a male and not of *stridhan* property.

A further point, however, arises in the judgment in the Allahabad case(1). It is suggested in the judgment of Mr. Justice Oldfield that the right of succession to *stridhan* is intimately connected in Bengal with the principle that inheritance depends upon spiritual benefit to be conferred upon ancestors, and that the capacity to confer such benefit is lost by unchastity, though a later passage seems to limit this extension of that principle, at all events, as far as the present case is concerned.

This matter seems to be explained by certain passages in the *Dayabhaga* to which my attention has been drawn, and which seem to show that the question of spiritual benefit does not apply in the present case. By paragraph 29, Chapter 4, section 3, property goes first to the whole brothers, then to the mother, then to the father, and then to the husband.

By paragraph 31 various persons, whom I need not name, on failure of heirs down to the husband are said to be similar to mothers, and section 37 provides for the inheritance of persons who claim through such mother. Such inheritance, it appears, depends on the principle of spiritual benefit.

The conclusion would seem to be that the characteristic doctrine of the Bengal Law is that, as far as the near relatives are concerned, inheritance depends on consanguinity; but in the case of remoter relations the law falls back on the principle of spiritual benefit.

Under these circumstances, it is plain that the doctrine of spiritual benefit does not apply in the present case. The alleged unchastity of the mother therefore discloses no bar to her inheritance.

*Judgment for plaintiff.*

Attorney for the plaintiff: *P. N. Sen.*

Attorneys for the defendant: *Morgan & Co.*

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(1) (1875) I. L. R. 1 All. 46.

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## APPEAL FROM ORIGINAL CIVIL.

ELOKESHI DASSI.

v.

HARI PROSAD SOOR.\*

1908.

Jan. 28.

*Practice—Probate, application to recall—Citation—Proof of will—Genuineness of will.*

On an application by a Hindu widow for an order that the probate obtained by her husband's brother of a will alleged to have been made by her husband be recalled, she not receiving any intimation of the application for probate; and that the will be proved in her presence :—

*Held*, that such an application ought to be granted, and that the probate of the will must be recalled and kept in the record until the case is decided.

APPEAL by the petitioner, Elokeshi Dassi, from an order of AMEER ALI J.

One Jugannath Prosad Soor, an inhabitant of Calcutta, and governed by the Bengal school of Hindu law, died without issue on the 25th July 1901, leaving him surviving his sole widow Elokeshi Dassi, and his brother Hari Prosad Soor. Some time after, in the month of January 1902, Elokeshi heard for the first time that a will had been propounded by the said Hari Prosad Soor, purporting to have been executed by her deceased husband, and that probate had already been obtained thereof from the High Court in her absence. Whereupon Elokeshi filed a petition, on the 26th April 1902, stating the above facts, and praying for an order that the probate of the alleged will granted to Hari Prosad Soor be recalled and revoked, and that the will be proved in her presence. This application came on for hearing before AMEER ALI J. who in his judgment dated the 20th June 1902, after going into the question of the genuineness of the will, dismissed the application, observing as follows :—

“In this Court, when an application is made for probate of a will which is in accordance with the law and is supported by affidavits of the attesting witnesses,

\* Appeal from Original Order No. 24 of 1902.

*Appellate Bench* : Sir Francis W. Maclean K.C.I.E., Chief Justice, Mr. Justice Hull and Mr. Justice Stevens.

it has not been the practice, excepting under special circumstances, to issue citations. Ordinarily the will is allowed to be proved in what is called common form, leaving it to any person, who has had no notice of the application, to apply to have the grant revoked. If the Court is satisfied that there is any just cause, it calls upon the propounder to prove the will in solemn form. The sufficiency of the cause is dealt with usually upon affidavits."

From this judgment and order Elokeshi appealed.

*Mr. Sinha* (*Mr. B. C. Mitter* with him) for the appellant. When probate of a will is obtained in common form without notice to the widow, she has a right to have the will proved in solemn form. No distinction can be made between the case of *Walter Rebels v. Maria Rebels*(1) and the present case. The widow is entitled to have citation served on her, and if that had been done she could have entered a caveat.

The Lower Court could not exercise any discretion in a case like this, inasmuch as Hari Prosad Soor, who applied for probate, had not stated in his petition the existence of the widow.

The case of *Kimona Soondury Dasse v. Hurro Lall Shaha* (2) deals with this question. The appellant is the heiress of her late husband; and in the case of a will practically disinheriting the heir, I submit special citation should be issued to all interested parties: *Komolochun Dutt v. Nilruttun Mundle*(3) and *Dintarini Dabi v. Doibo Chunder Roy*(4).

The law in this country under the Probate and Administration Act is the same as in England, and persons who are next of heir or heirs at law, can come in and have the will proved in solemn form: see *Williams on Executors*, p. 370, and *Bell v. Armstrong*(5). Even persons who take under a will can, if not cited, come in and have the will proved in solemn form. The Lower Court was not justified in going into the question of the genuineness of this will on the affidavit of the petitioner for probate, and I submit the order of the Lower Court is not correct.

*Mr. Dunne* (*Mr. Avetoom* with him) for the respondent. On applications for probate citations are not issued. That is the practice on the Original Side. Power is given under section 69 of the Probate and Administration Act, but that is discretionary.

(1) (1897) 2 C. W. N. 100.

(3) (1878) I. L. R. 4 Calc. 360.

(2) (1882) I. L. R. 8 Calc. 570.

(4) (1882) I. L. R. 8 Calc. 390.

(5) (1822) 1 Add. 365.

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The question here is whether there is just cause shown. Section 62 provides what is to be included in a petition, and there it is not stated that the representatives of the deceased should be mentioned. A petitioner for probate never has to state the heirs of the testator as in a petition for administration. That being so, there is no ground for suggesting that there was a defect in substance in the order passed by the Court below. If the Court held that the relatives of the deceased ought to be named in a petition for probate, then it would alter the practice on the Original Side, and that would have to be added to s. 62 of the Probate and Administration Act. The fact that the widow was not served with a citation does not show a defect at all under s. 50 of that Act.

The cases cited by the other side are all mofussil cases, and the practice there does not prevent a citation from being issued to the interested parties. I submit the order of the lower Court should stand.

Mr. Sinha in reply. The practice as to citation is the same in the mofussil as on the Original Side of the High Court, and I refer to the case of *Amrita Lal Mullick* (1) on this point. The question of the genuineness of the will cannot be tried on affidavits. The Court could not, upon mere affidavits, hold whether a will was forged or not. I submit I can contest it, and that it must be done on evidence.

MAULHAN C.J. This appeal must succeed.

It is an application by the widow of her deceased husband for an order that probate of the alleged will, which was granted by the Court below to the respondent, be recalled, and that it may be ordered that the said alleged will be proved in the presence of the petitioner.

The facts are as follows:—

Assuming there is no will, the appellant is the heiress of her late husband. The respondent sets up a will of which there were four or five executors: he alone proved the will, and in the application for probate, the present appellant was not cited, and apparently knew nothing whatever about it, until after probate was granted. She says, rightly or wrongly,—I do not enter

(1) (1900) I. L. R. 27 Calc. 350.

into that,—that the will is not a genuine will, and all she asks is that she should have an opportunity of showing that it is not a genuine will. That argument ought to prevail.

Assuming that what she states in her petition is correct,—and her story is supported by evidence on affidavit, though denied by the other side,—she makes out at any rate a *prima facie* case for enquiry. In making this observation I do not desire to be understood as expressing any opinion, one way or the other, as to the genuineness of the will in dispute. She was not cited, and she substantiated a case for having the probate of the will recalled, and of having an opportunity given her of showing that the will is not a genuine one.

If I may say so, with respect, the error into which the learned Judge in the Court below seems to me to have fallen is that on this application, he has decided the question as to the genuineness of the will. This was premature.

The application was one asking in effect only that the will be proved in the applicant's presence, and this ought to be done, on evidence given, in the way usual in probate cases, and not on this application.

On these grounds, the appeal must succeed with costs, and the probate granted must be recalled and kept in the record of this Court until the case is decided.

HILL J. I am of the same opinion.

STEVENS J. I am also of the same opinion.

Appeal allowed.

Attorney for the appellant: *Atul Chunder Ghose.*

Attorney for the respondent: *H. C. Ghose.*

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 March 31.

ABDUL HAKIM

v.

LATIFUNNESSA KHATUN.\*

*Limitation—Registration—Suit to enforce registration—Limitation Act (XV of 1877) ss. 6, 14—Period of Limitation, computation of—Registration Act (III of 1877) s. 77.*

An executant of a document not admitting execution, the Sub-Registrar refused to register it. There was an appeal to the Registrar, who also refused to register. Within thirty days of the dismissal of the appeal, an application for review was filed to the Registrar, which was also dismissed. On a suit brought in the Civil Court to enforce the registration of the document, after the dismissal of the said application for review:—

*Held*, that s. 14 of the Limitation Act had no application to the present case; and that the suit not having been brought within thirty days from the date of the dismissal of the appeal by the Registrar, it was barred by limitation.

*Nogendra Nath Mullick v. Maikhura Mohun Parhi*(1) followed in principle; *Veeramma v. Abbiah*(2), *Girija Nath Roy v. Patani Bibee*(3) referred to; and *Khetter Mohun Chuckerbutty v. Dinabashy Shaha*(4) discussed.

SECOND APPEAL by the plaintiff, Abdul Hakim.

This appeal arose out of an action brought by the plaintiff under s. 77 of the Registration Act to obtain an order for the registration of a deed of which registration was refused by the District Registrar. The plaintiff applied for the registration of a deed of gift by the legal heirs of a deceased Mahomedan lady who had executed the said deed. The heirs did not appear to admit execution, and the Sub-Registrar refused to register. There was an appeal to the Registrar, and, under s. 76 of the Registration Act, but the Registrar also, on the 4th May 1899, refused to register.

\* Appeal from Appellate Decree No. 1857 of 1900, against the decree of Girish Chunder Chatterjee, Additional Subordinate Judge of Dacca, dated June 12, 1900, affirming the decree of Harish Chunder Sen, Munsif of that district, dated Nov. 14, 1890.

(1) (1891) I. L. R. 18 Calc. 368.

(3) (1889) I. L. R. 17 Calc. 263.

(2) (1894) I. L. R. 18 Mad. 99.

(4) (1883) I. L. R. 10 Calc. 265.

The plaintiff then applied to the Registrar for a review, and on the dismissal of that application on the 24th June 1899, instituted the present suit on the 20th July 1899. The defence mainly was that the suit was barred by limitation. The Court of first instance dismissed the plaintiff's suit, having held that it was barred by limitation. On appeal, the Additional Subordinate Judge of Dacca affirmed the decree of the first Court.

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*Babu Harendra Narayan Mitter* for the appellant. The question is whether s. 14 of the Limitation Act has any application to the present case. I submit s. 14 of the Limitation Act applies, and I am entitled to the exclusion of time for review. [MACLEAN C.J. How does the review section of the Civil Procedure Code apply?]. There is some difficulty about it. [MACLEAN C. J. If the review section of the Code does not apply, I doubt very much whether section 14 of the Limitation Act applies.] Even assuming that the review section of the Code does not apply, but as I was prosecuting in good faith the proceeding in a Court which from defect of jurisdiction was unable to entertain it, I am entitled to exclude the time. [MITRA J. How do you get over s. 6 of the Limitation Act?]. By referring to the case of *Khetter Mohun Chuckerbutty v. Dinabashy Shaha*(1). The Court below was wrong in holding that the suit was barred because the application for review was not based upon the same cause of action. [MACLEAN C. J. Your proper remedy would have been to bring a suit within 30 days, and not to make an application for review.] Section 75 of the Registration Act says that, for the purposes of any enquiry under s. 74 of the Act, the Registrar may summon and enforce the attendance of witnesses and compel them to give evidence, as if he were a Civil Court. If it is a Court for the purpose of that enquiry, all the procedure of the Civil Procedure Code would apply, and therefore an application for review could be entertained by the Registrar. See the case of *Reasut Hossein v. Hadjee Abdoolah*(2). In the case of *Atchayya v. Gangayya*(3), it has been held that a Registrar acting under the Registration Act, ss. 55, 72—75, is a Court

(1) (1883) I. L. R. 10 Calc. 265.

(2) (1876) I. L. R. 2 Calc. 181; L. R. 3 I. A. 221.

(3) (1892) I. L. R. 15 Mad. 188.

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for the purposes of s. 195 of the Criminal Procedure Code. That being so, a Registrar is a Court for all purposes. [MACLEAN C. J. Does s. 14 of the Limitation Act apply to proceedings under the Registration Act, wherein special period of limitation is provided for?] Yes, My Lord, on that point, the case of *Khetter Mohun Chuckerbutty v. Dinabashy Shaha*(1) is in my favour. In the case of *Veeramma v. Abbiah*(2) opposite view has been taken to that of the Calcutta case. The case of *Nija-butoolla v. Wasir Ali*(3) supports my contention. The view taken in I. L. R. 10 Calc. 265, I. L. R. 8 Calc. 910, and I. L. R. 5 Calc. 314, has been followed in the case of *Guracharya v. The President of the Belgaum Town Municipalities*(4). No doubt in the case of *Girtja Nath Roy Bahadur v. Patani Bibee*(5) the case of *Khetter Mohun Chuckerbutty v. Dinabashy Shaha*(1) was discussed and some doubt was thrown as to the correctness of the decision. The Full Bench case of *Nagendra Nath Mullick v. Mathura Mohun Parhi*(6) considered whether s. 14 of the Limitation Act would be applicable to suits for arrears of rent under Act X of 1859; but this is a case under the Registration Act, and the same principle does not apply.

Babu Sarat Chunder Basak, for the respondent, was not called upon.

MACLEAN C. J. In this case the appellant applied for the registration of a certain deed of gift by the legal heirs of a deceased Mahomedan lady: the heirs did not appear to admit execution, and the Sub-Registrar refused to register. There was an appeal, and under section 76 of the Registration Act, the Registrar also refused to register. That order was made on the 4th of May 1899. The appellant, as is found by the Lower Court, instead of coming to the Civil Court under section 77, within the thirty days prescribed by that section, applied to the Registrar for a review, and on the dismissal of that application on the 24th of June 1899, instituted the present suit on the 20th of July of the same year.

(1) (1883) I. L. R. 10 Calc. 265.

(2) (1894) I. L. R. 18 Mad. 99.

(3) (1892) I. L. R. 8 Calc. 910.

(4) (1884) I. L. R. 8 Bom. 525.

(5) (1899) I. L. R. 17 Calc. 263, 266.

(6) (1891) I. L. R. 18 Calc. 368.

The question is, *first*, whether section 14 of the Limitation Act applies to the present case, and *secondly*, if so, whether, having regard to the nature of the application to the Registrar, the case is within that section.

In my opinion the provisions of the Limitation Act do not apply to the present case. This case is governed in principle by the Full Bench case of *Nogendra Nath Multick v. Mathura Mohun Parhi*(1), which is binding upon us. It is true that the decision there was in relation to another Act, and not under the Registration Act, but the same principle applies. That case was followed in the case of *Veeramma v. Abbiah*(2), where the matter was thoroughly gone into in a very careful judgment of that Court, and the same view was adopted. This decision is precisely in point, because it is in relation to the Registration Act which is now under discussion. The same view was in substance held by a Division Bench of this Court in the case of *Girija Nath Roy Bahadur v. Patani Bibee*(3). The appellant relies upon a case, *Khetter Mohun Chuckerbutty v. Dinabashy Shaha*(4), but, with every deference to the Judges who decided that case, I do not think that it can stand beside the Full Bench case(1) of this Court, to which I have referred. It is a feature in that case that section 6 of the Limitation Act, which is of the highest importance in deciding this question, is not even referred to by either of the learned Judges who decided that case; and that case did not meet with the approval of the Judges who decided the case of *Girija Nath Roy Bahadur v. Patani Bibee*(3). It is reasonably clear upon the authorities to which I have referred, and in which I concur, that the Limitation Act has no application to the present case, and the appeal must be dismissed with costs.

MITRA J. I concur.

Appeal dismissed.

S. C. G.

(1) (1891) I. L. R. 18 Calc. 368.

(2) (1894) I. L. R. 18 Mad. 99.

(3) (1889) I. L. R. 17 Calc. 263.

(4) (1883) I. L. R. 10 Calc. 265.

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Jan. 8.

## GOPAL CHUNDER MANDAL

v.

## BHOOBUN MOHUN CHATTERJEE.\*

*Mesne profits, assessment of—Landlord and tenant, combined position of—Costs.*

Where the position of the plaintiff is that of landlord and tenant combined, and the defendant, a sub-tenant, notwithstanding a notice served upon him under s. 167 of the Bengal Tenancy Act, withheld possession from the plaintiff, the mesne profits must be assessed on the value of the crops raised by the defendant, and not upon the basis of the rent which the rightful owner had been realising from the tenants, before dispossession.

SECOND APPEAL by the defendants, Gopal Chunder Mandal and another.

This appeal arose out of an action brought by the plaintiffs to recover mesne profits from the defendants, for the years 1303 to 1305 B.S., to the extent of Rs. 604, for 16 bighas of land from which the plaintiffs had been kept out of possession by the wrongful acts of the defendants. The defence was that the suit was bad for defect of parties, and that the amount claimed was excessive.

The Court of first instance decreed the plaintiffs' suit in a modified form. On appeal to the Subordinate Judge of 24-Pergunnahs, the decision of the first Court was affirmed. The material portion of the learned Subordinate Judge's judgment was as follows :—

"As to the amount of mesne profits, I find that the defendant was not a wrong-doer in the sense in which the word is ordinarily used; he was a *bona fide* tenant, but was evicted in a regular suit after a notice under section 167 of the Bengal Tenancy Act. Then, again, mesne profits are claimed for three years from 1302 B.S., but 1302 was a famine year in Bengal, and some of defendants' witnesses say that there was drought in that year. The lands are, however, *char* lands and yielded some profit, though a full crop was never obtained in 1302. The witnesses on either side gave their own version of the outturn of crops, and taking the figures as given by both sides, it would be safe to take an average, and in this view of the case, I find on calculation, the details of which I need not give here, that the

\* Appeal from Appellate Decree, No. 1148 of 1900, against the decree of Karuna Das Bose, Subordinate Judge of 24-Pergunnahs, dated March 21, 1900, modifying the decree of Girish Chundra Sen, Munsif of Basirhat, dated Aug. 4, 1899.

average profits will be Rs. 11 per bigha, for 10 bighas Rs. 110; and for three years, Rs. 330. The claim of the plaintiff is therefore decreed for Rs. 330, but with full costs in both the Courts. Defendant to bear his own costs."

*Babu Baikuntha Nath Das* for the appellants. The lands in question have always been let out to tenants, and the plaintiffs do not allege that they would cultivate the lands themselves; mesne profits should have been assessed upon the account of rents for which the lands were, or even could be, let out, and not upon the value of the crops raised: see *Bhiro Chandra Mosoomdar v. Bamundas Mookerjee*(1), *Huruck Lall Shaha v. Sreenibash Kurmoker*(2), *Chardon v. Ajeet Singh*(3), *Raghu Nandan Jha v. Jalpa Pat'ap*(4), *Ranee Asmed Koor v. Maharanee Indurjeet Koor*(5).

*Babu Hara Prasad Chatterjee* for the respondent was not called upon.

**BAWERJEE AND GHIDT JJ.** In this appeal, which arises out of a suit for mesne profits brought by the plaintiffs-respondents, three questions have been raised by the learned vakil for the defendants-appellants: *first*, whether the Court of Appeal below was right in rejecting the defendants' application for measurement of the land in respect of which mesne profits are claimed; *second*, whether the Court of Appeal below is right in assessing mesne profits according to the value of the crops claimed; and *third*, whether the Court of Appeal below is right in allowing the plaintiffs full costs, instead of costs in proportion to the amount decreed.

Upon the first point we are of opinion that as both the parties went into evidence and the plaintiff's evidence was believed by the first Court, and the decree of the first Court is affirmed by the second Court, it cannot be said that the refusal of the first Court to allow the defendants' application for a local investigation amounted to an error of law, such as would justify our interfering in second appeal. We may add that the plaintiff, when examined as a witness, said that he had himself measured the land, and that the area is what was stated in the plaint.

(1) (1869) 3 B. L. R. (A. C.) 88; 11 W. R. 461.

(2) (1871) 15 W. R. 423.

(4) (1897) 3 C. W. N. 743.

(3) (1869) 12 W. R. 52.

(5) (1868) 9 W. R. 415.

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Upon the second point, the contention of the learned vakil for the appellant is this, that the lands have always been let out to tenants, and as the plaintiffs do not say they would have cultivated the lands themselves, the mesne profits ought to have been assessed according to the rent at which the lands might have been let out, and not upon the value of the crops raised; and in support of this contention he refers to that class of cases in which it has been held that where a zemindar is dispossessed of his zemindari and the party wrongfully in possession cultivates the lands and raises crops, mesne profits should be ascertained, not according to the value of the crops raised by the wrong-doer, but upon the basis of the rent which the rightful owner had been realizing from the tenants, before dispossession.

We are of opinion that the present case is altogether distinguishable from the class of cases referred to above, because here the plaintiff or the landlord bought the tenure or holding of his tenant in which the present defendants had a sub-tenancy. The plaintiffs were therefore entitled, not only to the landlord's right in the land which they had before, but also to the tenant's right which they bought, and to the right to annul the sub-tenancy of the defendants, which they had done, by notice under section 167 of the Bengal Tenancy Act. After that notice they became entitled to actual possession; and if, nevertheless, such possession was withheld from them by the defendant until they were evicted by a decree obtained in a regular suit, they cannot complain if mesne profits are assessed upon the value of the crops raised by them, subsequently to their being served with notice under section 167. The position of the plaintiff here was not merely that of a landlord, but was that of landlord and tenant combined. Mesne profits must, therefore, in our opinion, be assessed on the value of the crops raised.

The first two contentions of the appellants fail.

In our opinion the third contention is entitled to succeed, as there is no reason given by the Lower Appellate Court why the costs should not be assessed in proportion. With this modification, the decree of the Lower Appellate Court is affirmed, and this appeal dismissed with costs.

S. C. G.

*Appeal dismissed.*

# PRIVY COUNCIL.

MOHORI BIBEE

v.

DHARMODAS GHOSE.

[On appeal from the High Court at Fort William in Bengal.]

*Minor—Estoppel—Statement known to be false by person to whom it is made—Evidence Act (I of 1872) s. 115—Age, false representation as to—Contract by infants—Contract Act (IX of 1872) ss. 11, 19, 64, 65—Mortgage by minor—Persons competent to contract—Void contract—Advances on mortgage declared invalid, repayment of.*

P. C.\*  
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June 11, 12.  
Nov. 26.  
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Section 115 of the Evidence Act (I of 1872) does not apply to a case where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties. A false representation made to a person who knows it to be false is not such a fraud as to take away the privilege of infancy.

*Nelson v. Stocker* (1) followed.

On the true construction of the Contract Act (IX of 1872) a person, who by reason of infancy is incompetent to contract, cannot make a contract within the meaning of the Act. A mortgage, therefore, made by a minor is void; and a money-lender who has advanced money to a minor on the security of the mortgage is not entitled to repayment of the money on a decree being made declaring the mortgage invalid; sections 64 and 65 of the Contract Act being based on there being a contract between competent parties, and being inapplicable to a case where there is not, and could not have been, any contract at all.

*Thurstan v. Nottingham Permanent Benefit Building Society* (2) followed.

APPEAL from a decree (12th December 1896) of a Bench of three Judges of the High Court at Calcutta affirming, on appeal, a decree (7th February 1898) made by a Judge of the same Court in the exercise of its Original Civil Jurisdiction in the respondent's favour.

The defendant, Brahmoo Dutt, appealed to His Majesty in Council, and on his death, pending the appeal, Mohori Bibee, and Sew Prasad Shroff, the executrix and executor under his will, were substituted for him on the record as appellants.

\* *Present*: Lords Macnaghten, Davey and Lindley, Sir Ford North, Sir Andrew Scott and Sir Arthur Wilson.

(1) (1859) 4 De G. & J. 458.

(2) [1902] 1 Ch. 1; [1903] A. C. 6.

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The suit was brought by the respondent, Dharmodas Ghose, to cancel, on the ground of his minority, a mortgage executed by him in favour of the defendant, Brahma Dutt, a money-lender. The case in its former stages will be found reported in I. L. R. 25 Calc. 616, and on appeal in I. L. R. 26 Calc. 381, where the facts are fully stated.

The appeal first came on for hearing before LORD DAVEY, SIR FORD NORTH, SIR A. SCOBLE, and SIR A. WILSON.

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 June, 11, 12.

*A. Phillips and Leslie De Gruyther* for the appellants contended that both the lower Courts were wrong in holding that the knowledge of Kedar Nath Mitter, the appellant's attorney, that the respondent was a minor, must be taken to be the knowledge of the appellant. Dedraj was the manager in Calcutta of the appellant's business, and he, and not Kedar Nath, really represented him in this transaction; and Dedraj did not know that the respondent was a minor. The Courts below were also in error in deciding that s. 15 of the Evidence Act (I of 1872) and s. 64 of the Contract Act (IX of 1872) are not applicable to minors. The word "person" as used in those sections meant not only a person "competent to contract," but applied to minors also; ss. 11 and 19 of the Contract Act were referred to. The respondent, therefore, it was submitted, was estopped by his declaration that he was not a minor, on which the appellant had acted and by which he had been deceived. If a person, who is a minor, represents himself as being not a minor, and thereby fraudulently induces another person to lend him money, the lender ought not to suffer by his having been deceived. The cases of *Gonesh Lala v. Bapu*(1), *Sarat Chunder Dry v. Gopal Chunder Laha*(2), *Sarat Chand Mitter v. Mohun Bibi*(3), *Mills v. Fox*(4), *Wright v. Snowe*(5), and *Dhanmull v. Ram Chunder Ghose*(6) were cited; and reference was made to the Transfer of Property Act (IV of 1882) s. 4 (by which certain

(1) (1895) I. L. R. 21 Bom. 198, 201.

(2) (1892) I. L. R. 20 Calc. 296; L. R. 19 I. A. 203, 215.

(3) (1898) I. L. R. 25 Calc. 371.

(4) (1887) L. R. 37 Ch. D. 153.

(5) (1848) 2 De Gex & S. 321.

(6) (1820) I. L. R. 24 Calc. 265.

sections are to be taken as part of the Contract Act) and s. 7; and it was contended that the Courts below, in giving the respondent a decree, ought to have ordered him to repay to the appellant the sum of Rs. 10,500, which had admittedly been received by the respondent as part of the consideration money under the mortgage deed. The Contract Act ss. 64 and 65 were referred to, and also the Specific Relief Act (I of 1877) ss. 38 and 41, under which, it was submitted, the Courts below should have exercised their discretionary powers and given compensation to the appellant, on decreeing the cancellation of the mortgage.

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*J. D. Mayne* and *W. C. Bonnerjee*, for the respondent, contended that on the construction of the Contract Act, the mortgage having been made by a person not of full age was absolutely void. According to the definition given in the Contract Act, s. 2, cl. (g), it was "an agreement not enforceable by law" and, as such, void. Under that Act a contract cannot be made, except by a person competent to contract, that is, a person under no disability. An agreement enforceable by law is either an absolute contract or a voidable contract: an agreement made by a person under a disability is one not enforceable by law, and is void. Contract Act, ss. 11, 19, and 64, and Transfer of Property Act, ss. 4 and 7, were referred to. All the cases of voidable contracts are of contracts made by persons competent to contract, but where something not known at the time had been discovered which made the contract voidable: there is no suggestion in the Contract Act that a contract made by an incompetent person can be a voidable contract: it is absolutely void. As to contracts by minors being void or voidable, reference was made to *Sashi Bhusan Dutt v. Jadu Nath Dutt*(1), *Hanmant Lakshman v. Jayarao Narsinha*(2), *Mahamed Arif v. Saraswati Debya*(3), *Fatima Bibi v. Debnauth Shah*(4) and *Tulsi Persad Bhakt v. Benayek Misser*(5). The last case shows that the question of age is a question of fact, and both Courts below have found in favour of the respondent that he was a minor, so that there are concurrent findings on that point. The declaration of the

(1) (1885) I. L. R. 11 Calc. 552.

(3) (1891) I. L. R. 18 Calc. 259, 263.

(2) (1888) I. L. R. 13 Bom. 50.

(4) (1893) I. L. R. 20 Calc. 508.

(5) (1896) I. L. R. 23 Calc. 918; L. R. 23 I. A. 102.

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respondent that he was not a minor does not nullify the fact of his minority, and he is not estopped by that declaration. The appellant was not deceived by it because he knew, through Kedar Nath who was acting with his authority, that it was false. The decisions of the Courts below should be upheld and the appeal dismissed.

*Phillips* replied, citing *Trevelyan on Minority*, 2nd ed., pp. 215-217 (1st ed., pp. 272-275), and the cases there referred to.

On November 26th, 1902, the appeal was re-argued on the point whether under the Contract Act a contract by a minor is void, or only voidable.

*J. D. Mayne* and *W. C. Bonnerjee*, for the respondent, contended that such a contract was absolutely void. Under the Contract Act, unless an agreement becomes a contract it is void, and a transaction by a minor is treated by that Act as an agreement which has never become a contract. Reference was made to the Contract Act, ss. 2, 10, 11, 19, 22, 23, 24, and 31. In the last-mentioned section the contract is called a "written instrument;" and here the minor has executed a "written instrument" which is void. Sections 38, 39, and 41 of the Specific Relief Act (I of 1877) were also referred to. An agreement by a minor is not a contract at all; it is a void transaction. [LORD DAVEY referred to the effect of Hindu Law on the case, under which law a contract made by a minor is void, and cited *Strange's Hindu Law*, p. 271, and *Colebrooke's Digest*, Book II, ch. 2, s. 1, verse 11; Book II, ch. 4, s. 2, verse 57.]

*Phillips* and *DeGruyther* for the appellant. The authority of the decided cases shows that a contract by a minor is voidable only, and not absolutely void. Reference was made to *Jamsetjee N. Tata v. Kashinath Jivan Manglia*(1), *Mahamed Arif v. Saraswati Debye*(2), *Boidonath Dey v. Ram Kishore Dey*(3), *Doorga Churn Shaha v. Ram Narain Doss*(4), *Rennie v. Gunga*

(1) (1901) I. L. R. 26 Bom. 326, 327.

(2) (1891) I. L. R. 18 Calc. 259.

(3) (1870) 10 B. L. R. 326 (note); 13 W. R. 166.

(4) (1870) 10 B. L. R. 327 (note); 13 W. R. 172.



*Narain Chowdhry*(1), *Hari Ram v. Jitan Ram*(2), and *Khair-unnessa Bibi v. Lokenath Pal*(3) [SIR A. WILSON referred to *Sadashiv Vaman Dhamankar v. Trimbak Divakar Karandikar*(4)]

All these cases show that a contract by a minor is only voidable and not void. Contract Act, s. 2, cl. (g), and ss. 10, 14, 23, 24, and 25 were referred to. If competency to contract is essential to make a contract, all the other conditions are presumably essential. But the Contract Act shows that some of them are not essential. It has never been amended so as expressly to make competency to contract essential. In a recent Act (VI of 1899) to amend the Contract Act, the Legislature has not thought fit to set the Courts right as to the effect of a contract by a minor; presumably, therefore, the Legislature does not think they are wrong.

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The respondent was not heard in reply.

The judgment of their Lordships was delivered by

**SIR FORD NORTH.** On the 20th of July 1895 the respondent, Dharmodas Ghose, executed a mortgage in favour of Brahmo Dutt, a money-lender carrying on business at Calcutta and elsewhere, to secure the repayment of Rs. 20,000 at 12 per cent. interest, on some houses belonging to the respondent. The amount actually advanced is in dispute. At that time the respondent was an infant; and he did not attain 21 until the month of September following: Throughout the transaction Brahmo Dutt was absent from Calcutta, and the whole business was carried through for him by his attorney, Kedar Nath Mitter, the money being found by Dedraj, the local manager of Brahmo Dutt. While considering the proposed advance Kedar Nath received information that the respondent was still a minor; and on the 15th of July 1895 the following letter was written and sent to him by Bhupendra Nath Bose, an attorney:—

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“DEAR SIR,

“I am instructed by S. M. Jogendranandinee Dasi, the mother and guardian appointed by the High Court under its Letters Patent of the person and property of Babu Dharmodas Ghose, that a mortgage of the properties of the said Babu

(1) (1865) 3 W. R. 10, 11.

(2) (1869) 3 B. L. R. (A. C.) 426.

(3) (1899) I. L. R. 27 Calc. 276.

(4) (1898) I. L. R. 23 Bom. 146.

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Dharmodas Ghose is being prepared from your office. I am instructed to give you notice, which I hereby do, that the said Babu Dharmodas Ghose is still an infant under the age of 21, and any one lending money to him will do so at his own risk and peril."

Kedar Nath positively denied the receipt of any such letter; but the Court of First Instance and the Appellate Court both held that he did personally receive it on the 15th July; and the evidence is conclusive upon the point.

On the day on which the mortgage was executed, Kedar Nath got the infant to sign a long declaration which he had prepared for him, containing a statement that he came of age on the 17th of June; and that Babu Dedraj and Brahmo Dutt, relying on his assurance that he had attained his majority, had agreed to advance to him Rs. 20,000. There is conflicting evidence as to the time when, and circumstances under which, that declaration was obtained; but it is unnecessary to go into this, as both Courts below have held that Kedar Nath did not act upon, and was not misled by, that statement; and was fully aware at the time the mortgage was executed of the minority of the respondent. It may be added here that Kedar Nath was the attorney and agent of Brahmo Dutt, and says in his evidence that he got the declaration for the greater security of his "client." The infant had not any separate legal adviser.

On the 10th of September 1895 the infant by his mother and guardian as next friend commenced this action against Brahmo Dutt, stating that he was under age when he executed the mortgage, and praying for a declaration that it was void and inoperative, and should be delivered up to be cancelled.

The defendant, Brahmo Dutt, put in a defence that the plaintiff was of full age when he executed the mortgage; that neither he nor Kedar Nath had any notice that the plaintiff was then an infant; that even if he was a minor, the declaration as to his age was fraudulently made to deceive the defendant, and disentitled the plaintiff to any relief; and that in any case the Court should not grant the plaintiff any relief without making him repay the moneys advanced.

By a further statement the defendant alleged that the plaintiff had subsequently ratified the mortgage; but this case wholly failed, and is not the subject of appeal.

Mr. Justice Jenkins, who presided in the Court of First Instance, found the facts as above stated, and granted the relief asked. And the Appellate Court dismissed the appeal from him. Subsequently to the institution of the present appeal Brahmoo Dutt died, and this appeal has been prosecuted by the executors.

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The first of the appellants' reasons in support of the present appeal is that the Courts below were wrong in holding that the knowledge of Kedar Nath must be imputed to the defendant. In their Lordships' opinion they were obviously right. The defendant was absent from Calcutta and personally did not take any part in the transaction. It was entirely in charge of Kedar Nath, whose full authority to act as he did is not disputed. He stood in the place of the defendant for the purposes of this mortgage, and his acts and knowledge were the acts and knowledge of his principal. It was contended that Dedraj, the defendant's gomastha, was the real representative in Calcutta of the defendant, and that he had no knowledge of the plaintiff's minority. But there is nothing in this. He no doubt made the advance out of the defendant's funds. But he says in his evidence that "Kedar Babu was acting on behalf of my master from the beginning in this matter," and a little further on he adds that before the registration of the mortgage he did not communicate with his master on the subject of the minority. But he did know that there was a question raised as to the plaintiff's age; and he says: "I left all matters regarding the minority in the hands of Kedar Babu."

The appellants' Counsel contended that the plaintiff is estopped by section 115 of the Indian Evidence Act (I of 1872) from setting up that he was an infant when he executed the mortgage. The section is as follows:—"Estoppel. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing."

The Courts below seem to have decided that this section does not apply to infants; but their Lordships do not think it necessary to deal with that question now. They consider

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it, clear that the section does not apply to a case like the present, where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties, and their Lordships hold, in accordance with English authorities, that a false representation, made to a person who knows it to be false, is not such a fraud as to take away the privilege of infancy : *Nelson v. Stocker* (1). The same principle is recognised in the explanation to section 19 of the Indian Contract Act, in which it is said that a fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

The point most pressed, however, on behalf of the appellants was that the Courts ought not to have decreed in the respondent's favour without ordering him to repay to the appellants the sum of Rs. 10,500 said to have been paid to him as part of the consideration for the mortgage. And in support of this contention section 64 of the Contract Act (IX of 1872) was relied on.

"Section 64. When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received."

Both Courts below held that they were bound by authority to treat the contracts of infants as voidable only, and not void; but that this section only refers to contracts made by persons competent to contract, and therefore not to infants.

The general current of decision in India certainly is that ever since the passing of the Indian Contract Act (IX of 1872), the contracts of infants are voidable only. This conclusion, however, has not been arrived at without vigorous protests by various Judges from time to time; nor indeed without decision to the contrary effect. Under these circumstances their Lordships consider themselves at liberty to act on their own view of the law

(1) (1859) 4 DeG. & J. 458.

as declared by the Contract Act, and they have thought it right to have the case re-argued before them upon this point. They do not consider it necessary to examine in detail the numerous decisions above referred to, as in their opinion the whole question turns upon what is the true construction of the Contract Act itself. It is necessary therefore to consider carefully the terms of that Act, but before doing so it may be convenient to refer to the Transfer of Property Act (IV of 1882), section 7 of which provides that every person competent to contract and entitled to transferable property . . . is competent to transfer such property . . . in the circumstances, to the extent, and in the manner allowed and prescribed by any law for the time being in force. That is the Act under which the present mortgage was made, and it is merely dealing with persons competent to contract; and section 4 of that Act provides that the chapters and sections of that Act which relate to contracts are to be taken as part of the Indian Contract Act, 1872. The present case therefore falls within the provisions of the latter Act.

Then, to turn to the Contract Act, section 2 provides "(e) Every promise and every set of promises, forming the consideration for each other, is an agreement." "(g) An agreement not enforceable by law is said to be void." "(h) An agreement enforceable by law is a contract." "(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract."

Section 10 provides: "All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration, and with a lawful object, and are not hereby expressly declared to be void."

Then section 11 is most important as defining who are meant by "persons competent to contract." It is as follows:—"Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject." Looking at these sections their Lordships are satisfied that the Act makes it essential that all contracting parties should be "competent to contract," and expressly provides that a person, who by reason of infancy is incompetent to contract,

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cannot make a contract within the meaning of the Act. This is clearly borne out by later sections in the Act. Section 68 provides that "If a person, incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person." It is beyond question that an infant falls within the class of persons here referred to as incapable of entering into a contract ; and it is clear from the Act that he is not to be liable even for necessaries, and that no demand in respect thereof is enforceable against him by law, though a statutory claim is created against his property. Under sections 183 and 184 no person under the age of majority can employ or be an agent. Again, under sections 247 and 248, although a person under majority may be admitted to the benefits of a partnership, he cannot be made personally liable for any of its obligations ; although he may on attaining majority accept those obligations if he thinks fit to do so. The question whether a contract is void or voidable presupposes the existence of a contract within the meaning of the Act, and cannot arise in the case of an infant. Their Lordships are therefore of opinion that in the present case there is not any such voidable contract as is dealt with in section 64.

A new point was raised here by the appellants' Counsel founded on section 65 of the Contract Act, a section not referred to in the Courts below, or in the cases of the appellants or respondent. It is sufficient to say that this section, like section 64, starts from the basis of there being an agreement or contract between competent parties ; and has no application to a case in which there never was, and never could have been, any contract.

It was further argued that the preamble of the Act showed that the Act was only intended to define and amend certain parts of the law relating to contracts, and that contracts by infants were left outside the Act. If this were so, it does not appear how it would help the appellants. But in their Lordships' opinion the Act, so far as it goes, is exhaustive and imperative ; and does provide in clear language that an infant is not a person competent to bind himself by a contract of this description.

Another enactment relied upon as a reason why the mortgage money should be returned, is section 41 of the Specific Relief Act (I of 1877), which is as follows :—"Section 41. On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require." Section 38 provides in similar terms for a case of rescission of a contract. These sections no doubt do give a discretion to the Court, but the Court of First Instance and subsequently the Appellate Court, in the exercise of such discretion, came to the conclusion that under the circumstances of this case justice did not require them to order the return by the respondent of money advanced to him with full knowledge of his infancy, and their Lordships see no reason for interfering with the discretion so exercised.

It was also contended that one who seeks equity must do equity. But this is the last point over again and does not require further notice, except by referring to a recent decision of the Court of Appeal in *Thurstan v. Nottingham Permanent Benefit Building Society* (1) since affirmed by the House of Lords. In that case a female infant obtained from the Society of which she was a member part of the purchase-money of some property she purchased; and the Society also agreed to make her advances to complete certain buildings thereon. They made the advances and took from her a mortgage for the amount. On attaining 21 she brought the action to have the mortgage declared void under the Infants Relief Act. The Court held that, as regards the purchase-money paid to the vendor, the Society was entitled to stand in his place and had a lien upon the property; but that the mortgage must be declared void and that the Society was not entitled to any repayment of the advances. Dealing with this part of their claim Lord Justice Romer says at page 13: "The short answer is that a Court of Equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the Legislature has declared to be void." So here.

Their Lordships observe that the construction which they have put upon the Contract Act seems to be in accordance with the old Hindu Laws as declared in the laws of Menu, ch viii., 163, and

(1) [1902] 1 Ch. 1; [1903] A. C. 6.

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Colebrooke's Digest (1), although there are no doubt decisions of some weight that before the Indian Contract Act, an infant's contract was voidable only, in accordance with English law as it then stood.

The appeal therefore wholly fails; and their Lordships will humbly advise His Majesty that it should be dismissed. The appellants must pay the costs of the appeal.

*Appeal dismissed.*

Solicitors for the appellants: *Watkins and Lempriere.*

Solicitor for the respondent: *W. W. Box.*

J. V. W.

(1) Book II., ch. 4., s. 2, art. 3, verses 53, 57.

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JIBAN KRISHNA ROY

v.

BROJO LAL SEN.

[On Appeal from the High Court at Fort William in Bengal.]

*Execution of decree—Sale for arrears of rent—Bengal Rent Act (Bengal Act VIII of 1869) ss. 59, 60, 64—Decree for arrears of rent against Hindu heiress—Rent accrued due after death of full owner—What passes by sale, whether limited or absolute estate.*

In execution of a decree for arrears of rent obtained in a suit under the Bengal Rent Act (Bengal Act VIII of 1869) by some only of several co-sharer landlords against a Hindu daughter for arrears accruing after her father's death, an under-tenure of which she was in possession and in enjoyment of the rents and profits was sold under the provisions of s. 64 of the Act:

*Held* by the Judicial Committee (affirming the judgment of the High Court) that only the limited interest which she took as her father's daughter, and not an absolute interest in the estate passed by the sale. The liability for rent ought to be regarded as her personal liability, and ought not to be held as attaching to the reversion unless the landlords proceeded to bring the tenure to sale under the special provisions of the Rent Law.

APPEAL from a judgment and decree (8th September 1898) of the High Court of Calcutta by which the decree (3rd October

\* *Present*: Lords Macnaghten and Lindley, Sir Andrew Scoble, Sir Arthur Wilson and Sir John Bonser.



1896) of the First Subordinate Judge of the 24-Pergunnahs, which had dismissed the respondent's suit, was varied.

Appeal by the defendant, Jiban Krishna Roy, to His Majesty in Council.

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The property in suit was known as Chuck Bele Doorganugger which had belonged to one Ram Sagore Mitter, who died intestate in 1834, leaving two daughters, Anundomoyi and Isaneswari, who inherited the property jointly. Anundomoyi died in 1835, leaving a son, Uma Churn Dutt, between whom and Isaneswari an arrangement was made by which they divided the property equally between them. Uma Churn died in 1872. Isaneswari died on 26th February 1894, leaving no issue surviving her. On 27th July 1894 the respondent brought his suit for the whole of the property, claiming as daughter's son of Gadadhur Mitter, paternal uncle of Ram Sagore Mitter, to be the nearest reversionary heir. Both Courts held that the interest which had been acquired by Uma Churn Dutt to a moiety of the property was an absolute interest, and as to that moiety the respondent's claim was dismissed. On this appeal the 8-anna share of Isaneswari only was in dispute. Both Courts below held that the respondent was the nearest heir, and the only question argued on this appeal was whether an execution in sale of 5th January 1885, under which Isaneswari's half share had been sold for arrears of rent, passed to the purchaser an absolute estate in the property or only the limited estate held by Isaneswari as a Hindu daughter.

The Subordinate Judge held that the sale passed an absolute estate and dismissed the suit, but the High Court (MACLEAN C.J. and BANERJEE J.) were of opinion that only the limited estate passed by the sale; and they gave the respondent a decree for Isaneswari's moiety of the property sued for.

The case in the Courts below is reported in I. L. R. 26 Cal. 285, where all the facts are fully stated.

On this appeal :

*Dr. Gruyther*, for the appellant, contended that the purchaser at the sale of 5th January 1885 acquired an absolute interest in the property sold, and not only the limited estate held by Isaneswari. Where property in possession of a Hindu lady is itself sold for arrears of rent, the whole estate passes to the

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purchaser and the interest of the reversioners is extinguished. Bengal Act VIII of 1869, under which the sale in execution took place, enacts that the landlord has the right to sell the whole of the tenure, not only the right and interest of the tenant, for arrears of rent. Bengal Act VIII of 1869, ss. 34, 59, 60, 64 and 66, and the cases of *Ashanulla Khan v. Rajendra Chandra Rai*(1) and *Teluck Chunder Chuckerbutty v. Muddon Mohun Brahmin Joogee*(2) were referred to.

The position of a Hindu female owner is such that she represents the estate absolutely. Reference was made to *Katama Natchier v. Rajah of Shivagunga*(3), *Hunooman Persaud Panday v. Munraj Koonveree*(4), *Kameswar Pershad v. Run Bahatur Singh*(5), *Baijun Doobey v. Brij Bhookun Lall Awasti*(6), *Anund Moyee Dossee v. Mohendro Narain Doss*(7). Cases to the contrary effect are cases in which what was brought to sale was not the tenure in respect of which the arrears were due: see *Mohima Chunder Roy Chowdhry v. Ram Kishore Acharjee Choudhry*(8), and *Kristo Gobind Majumdar v. Hem Chunder Chowdhry*(9).

As to what was actually sold, *Jugul Kishore v. Jotendro Mohun Tagore*(10) was referred to as laying down the rule for the construction of sale certificates in cases similar to the present. In this case Isaneswari applied to have the sale set aside, and it was submitted that the decision refusing her application was *res judicata* and bound the respondent.

*W. C. Bonnerjee*, for the respondent, referred to the form of the prayer of the petition for execution of the decree which was for the amount due, and that it might be recovered by the sale of the property in arrear; and to the decree which was an ordinary decree for money. Only a portion of the tenure was

- (1) (1885) I. L. R. 12 Calc. 464.
- (2) (1869) 15 B. L. R. 143 (note); 12 W. R. 504.
- (3) (1863) 9 Moo. I. A. 539, 604.
- (4) (1856) 6 Moo. I. A. 393, 423.
- (5) (1880) I. L. R. 6 Calc. 843; L. R. 8 I. A. 8.
- (6) (1875) I. L. R. 1 Calc. 133; L. R. 2 I. A. 275.
- (7) (1871) 15 W. R. 264.
- (8) (1875) 15 B. L. R. 142; 23 W. R. 174.
- (9) (1889) I. L. R. 16 Calc. 511.
- (10) (1884) I. L. R. 10 Calc. 985, 991, 992; L. R. 11 I. A. 66, 71, 73.

in arrear. If the whole of it passed under the sale, what became of the security of the other fractional shareholders? It was submitted that all that was sold was the right, title, and interest of Isaneswari: the tenure itself was not sold, and did not pass by the sale in execution. To effect that result, the special procedure provided by the Rent Act must be resorted to, and all the other co-sharers must have been made parties. Here the procedure in execution was that under the Code of Civil Procedure. Bengal Act VIII of 1869, ss. 59 and 64; *Nugender Chunder Ghose v. Sreemutty Kaminnee Dossee*(1) and *Baijun Doobey v. Brij Bhookun Lall Awasti*(2) were referred to, and it was submitted that the latter case laid down the principles which governed the present case. A Hindu lady in the position of Isaneswari took an absolute estate, but her power of alienation over it was limited. The decision of the High Court was right and should be upheld.

*DeGruyther* replied.

The judgment of their Lordships was delivered by

**SIR ANDREW SCOBLE.** The question in this appeal is as to the title to a half share of the estate of Chuck Bele Doorganugger in Bengal, which, prior to 1834, belonged to one Ram Sagore Mitter. Upon his death he was succeeded by his two daughters, Anundmoyi and Isaneswari; and upon the death of the former, her son and his aunt Isaneswari divided the estate equally between themselves; and Isaneswari continued to hold her half share until her death in February 1894. The respondent now claims it as next heir to the estate of Ram Sagore according to the Hindu law in force in Bengal, while the appellant claims as purchaser at a sale in execution of decrees for rent obtained against Isaneswari in 1883-84. And the point for determination is whether the purchaser at the sale acquired an absolute interest in the estate sold, or only such limited interest as Isaneswari took as her father's daughter.

Both Courts in India have found that the property in question was originally the estate of Ram Sagore Mitter, and that on the death of Isaneswari the respondent was the next heir, and these findings were not disputed before their Lordships. It is therefore only necessary to consider the circumstances of the case so far as

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(1) (1867) 11 Moo. I. A. 241.

(2) (1875) I. L. R. 1 Calc. 133; L. R. 2 I. A. 275.

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they relate to the execution sale which is the foundation of the appellant's claim.

The estate known as Chuck Bele Doorganugger is an under-tenure of a zemindari which is not specifically named, and in which there are several co-sharers. To the suits brought against Isaneswari in 1883-84 for arrears of rent only some of these co-sharers were parties; and although, in one of them, the plaintiffs prayed that the amount decreed might be "recovered by the sale of the property in arrears," the decrees given were for money only. This was in accordance with the provisions of Bengal Act VIII of 1869, by which the procedure in suits between landlords and tenants was at that time regulated. Section 64 enacts that when a decree for arrears of rent has been obtained by a co-sharer in a joint undivided estate, the under-tenure cannot be sold until the moveable property of the judgment-debtor has been sold, and proved insufficient to satisfy the decree. "In such case," the section proceeds, "such under-tenure, if of the nature described in s. 59" (that is to say, if by the title-deeds or the custom of the country it is transferable by sale), "may be seized and sold in execution of such decree, according to the ordinary procedure of the Court, and not in the manner provided in the said section, and every such sale shall have such and the same effect as the sale of any immoveable property sold in execution of a decree, not being for arrears of rent payable in respect thereof;" in other words, as if the sale were in execution of an ordinary money-decree, in which case, as is established by a long series of decisions, only the right, title and interest of the judgment-debtor passes. To make the tenure itself liable to sale in execution, the special procedure required by the Act would be necessary, and all the co-sharers would have to be made parties to the suit. This course was not followed in the case under consideration, but the execution-sale was made under the ordinary conditions imposed by the Code of Civil Procedure.

The Subordinate Judge held that what was sold was not the interest of a Hindu widow (P daughter), but the estate which she represented. The learned Judges of the High Court, however, were of opinion that as "the suit for rent was brought against Isaneswari alone, and in respect of arrears which accrued due

after her father's death, and as she was in enjoyment of the rents and profits of the Chuck, the liability for rent ought to be regarded as her personal liability, and ought not to be held as attaching to the reversion unless the landlords proceeded to bring the tenure itself to sale under the special provisions of the Rent Law." In this opinion their Lordships concur. The provisions of the Rent Law were devised for the protection of all parties interested in the tenure, and they would be defeated if fractional shareholders were allowed to evade them by the method adopted in this case.

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It was properly pointed out to their Lordships by Mr. Bonnerjee, the learned Counsel who appeared for the respondent, that in awarding mesne profits "for the three years next preceding the institution of the suit," the High Court had lost sight of the fact that Isaneswari died on the 26th February 1894, and that the suit was instituted on the 27th July 1894, about five months after her death. The decree must therefore be amended so as to give mesne profits from the 26th February 1894, on which date the respondent succeeded to the estate, until delivery of possession to him. Subject to this amendment, their Lordships will humbly advise His Majesty that the decree of the High Court should be confirmed and this appeal dismissed. The appellant must pay the costs of the appeal.

*Decree varied. Appeal dismissed.*

Solicitors for the appellants : *T. L. Wilson & Co.*

Solicitor for the respondents : *G. C. Farr.*

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## ASGHAR REZA KHAN

v.

MAHOMED MEHDI HOSSEIN KHAN;

AND THE CROSS APPEAL.

[On appeal from the High Court at Fort William in Bengal.]

*Res judicata—Decision in former suit—Parties—Parties in subsequent suit all claiming under one party only in former suit—Deeds, construction of—What passes under deed in absence of words reserving rights—Transfer of Property Act (IV of 1882) s. 8.*

The decision in a suit by one of two zemindars against the other as to the right to the profit rental of a bazar was held not to be *res judicata* in a subsequent suit for possession of a share of the bazar in which suit all the parties, plaintiffs and defendants, claimed under the plaintiff in the former suit. Such a plea, however, might well be a defence to a hostile claim by persons asserting a title under the defendant-zemindar in the former suit against those claiming under the plaintiff-zemindar in that suit:

*Held*, on the true construction of deeds of mortgage, and of sale, and a certificate of sale, of shares in a zemindari, where the documents contained no words of exception or reservation that they conveyed all the interests of the mortgagor, vendor, and judgment-debtor respectively in the zemindari. Their interests in the houses on the land and in the profit rents derived from them passed in the absence of any words showing an intention to retain or exclude them.

APPEAL and cross-appeal consolidated from a judgment and decree (21st January 1898) of the High Court at Calcutta modifying a decree (31st March 1896) of the Subordinate Judge of Purneah, which was in favour of the respondents and cross-appellants.

Appeal by the first defendant, Ashgar Reza Khan, and Cross-Appeal by the plaintiffs Mahomed Mehdi Hossein Khan and others, to His Majesty in Council.

The suit out of which these appeals arose was brought by the respondents, who were the heirs of Nawab Syad Latf Ali Khan, and they sued the appellant, Ashgar Reza, his brother Dilawar Reza, and certain other defendants to establish their title to and

\* *Present* : Lords Macnaghten, Shand and Lindley, Sir Andrew Scoble, Sir Arthur Wilson and Sir John Bousser.

obtain possession of certain properties—(1) an undivided share in a village and bazar called Kutubgunge, (2) an *arhat* called Phar, (3) a hât or market called Alimganj, and (4) a julkur or fishery called Peazmoni: all situate in pergunnah Surjapore. The suit was brought on the allegation that the properties were appurtenant to, and part and parcel of, the zemindari estate of Surjapore; and whether they were so or not was the main question in this appeal.

The plaintiffs made title on the following facts. The last sole owner of pergunnah Surjapore was Raja Fakhruddin Hossein, who at his death left two sons, Akbar Hossein and Didar Hossein. The latter took up his residence at the village of Khagra and was succeeded by his son, Inayet Hossein. Akbar Hossein went to live at the village of Kishenganj, and on his death his widow, Rani Zahurunnissa, obtained possession of his share in the estate. She was succeeded by her brother, Hossein Reza, who, in turn, was succeeded by his son, Ahmed Reza. After litigation the respective interests in the estate were fixed at 9 annas 8 gundahs for the Khagra branch, and 6 annas 12 gundahs for the Kishanganj branch. In the latter share the wife of Ahmad Reza held 11 gundahs. Ahmad Reza died in May 1870, leaving by one wife two sons, Haidar Reza and Safdar Reza, and by another wife four sons, the defendants Asghar Reza, Dilawar Rezas, and two others who died. The mother of Haidar Reza and Safdar Reza having also died, each of her sons was in 1876 in proprietary possession of a share in pergunnah Surjapore amounting to 1 anna 5 gundahs 2 cowries and 2 krants. On 25th April 1876 Haidar Reza mortgaged to Nawab Syad Lutf Ali the whole of his share in the pergunnah. The material portion of the deed of mortgage was as follows:—

“Whereas the entire 1 anna 2 krants out of 2 annas 1 cowrie 1 krant of the entire 6 annas 1 gundah share left by my father, and 5 gundahs 2 cowries out of 11 gundahs share left by my mother, in all 1 anna 5 gundahs 2 cowries 2 krants proprietary, zemindari and ahlemashi rights, out of 6 annas 12 gundahs share left by my father and mother of the entire 16 annas of the pergunnah Surjapore, inclusive of all mehals, taluks, mouzahs, kismuts, and arasiats original with dependencies, pergunnah aforementioned, towzi No. 7, Zillah Purnea, and towzi No. 265 in Zillah Dinagapore . . . . . are exclusively owned and possessed by me, and I have exclusively held the same in my possession up to this time, free from the co-partnership and possession of any other person, the same, together with all the lands cultivated or uncultivated, reclaimed or not

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reclaimed, jungles, mahwajhal, sayerwajhal, all grain duties, julkars, bankars, ahurs, ponds . . . . . and all zemindaris, palms, ahlemashi, &c., rights and cesses, appertaining to the said pergunnah, save and except the old and usual *minakai* and *muqaf* lands exempted by the Mahomedan Law, and save and except the amlak and resumed rent-free holdings both ancestral and purchased by me have been granted in ijara by me."

On the 5th May 1883 Haidar Reza sold to Nawab Syad Lutf Ali out of the property mortgaged a share amounting to 1 anna 2 cowries 2 krants. The operative part of the deed was as follows:—

"In all 1 anna 2 cowries 2 krants proprietary zemindari and ahlemashi right out of 6 annas 12 gundahs share left by my father and mother out of the 16 annas zemindari right in the aforesaid pergunnah Surjapore . . . . . owned and possessed by me exclusively up to this time . . . . . together with all the boundaries, rights, interests, appurtenances and all mehals, taluks, mouzaha, kismuts, gutches, all cultivated and uncultivated lands . . . . . grain duties, julkars . . . . . ground-rents of tenants, houses of tenants, ghata, hats, bazars, gunges, &c., cutcherry houses, and all zemindari proprietary and patni rights and cesses, &c., appertaining to the aforesaid pergunnah Surjapore, towzi No. 7 in the district of Purnea, and towzi No. 265 in the district of Dinagapore, and all appurtenances thereto, save and except the long-standing usual *minakai* and *muqaf* lands, exempted by the Mahomedan Law, have been sold absolutely by me."

Safdar Reza had also, on 25th April 1876, executed in favour of Nawab Syad Lutf Ali Khan a mortgage of his share in the pergunnah, similar in terms to that executed by Haidar Reza. He also created a further charge in the same share by a bond dated the 20th August 1880 in favour of his mortgagee, who obtained a decree for possession of the share on 10th December 1883. On his marriage in 1883 Safdar Reza had charged his share in the pergunnah as security for the payment of his wife's dower. On her death her heirs sued him for payment by sale of the mortgaged property, if necessary, and obtained a decree on 27th May 1889, in execution of which his share was sold by auction on 4th April 1892 and purchased by the plaintiffs. The sale certificate, dated 18th December 1894, described the property sold in the following terms:—

"1 anna 5 gundahs 2 cowries 2 krants zemindari in pergunnah Surjapore, the mortgaged property forming the right and interest of Syad Safdar Reza, judgment-debtor."

The plaintiffs then claimed to have acquired by the purchase of shares from Haidar Reza and Safdar Reza the whole of the



interest (amounting in all to 2 annas 6 gundahs 1 cowrie 1 krant share) in pergunnah Surjapore of which Haidar Reza and Safdar Reza could dispose. Being obstructed by Asghar Reza and his brother, Dilawar Reza, in getting possession of this share, the plaintiffs on 8th April 1895 instituted the present suit, praying for recovery of possession of the properties in dispute with mesne profits and costs.

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Asghar Reza and Dilawar Reza defended the suit and denied that the properties in suit were appurtenant to Surjapore, and claimed them to be their own private properties, separate and apart from the estate conveyed by either the mortgages or sales of the interests of Haidar Reza and Safdar Reza. With respect to Kutubgunge, they alleged it was their mukurari istemrari ancestral property, and was also that of Haidar Reza and Safdar Reza; that it had been decided in a suit between Ahmed Reza (the father and ancestor of Asghar Reza and Dilawar Reza and of Haidar Reza and Safdar Reza) and Inayet Hossein, zemindar of Khagra, that it was a bazar erected by the ancestors of Ahmed Reza, the plaintiff in that suit, and that Inayet Hossein, the defendant in that suit, as a co-sharer of the pergunnah Surjapore, had no right and claim to it, and they submitted that that decision was binding on the plaintiffs and was *res judicata* in the present suit. They alleged that the other properties were ancestral rent-free lands, and that they had acquired the interest of Haidar Reza and Safdar Reza in those properties and in Kutubgunge by deeds of sale of 2nd August 1890 and 11th February 1891, and by sale in execution of a decree on 29th May 1887. They also set up the plea of limitation.

The other defendants, who were the heirs of Haidar and Safdar Reza, did not defend the suit. Issues were raised, of which the following only were material :—

- (2) Is the claim barred by limitation ?
- (4) Have the plaintiffs acquired any title to the properties in suit under the ijaras and purchases they have set up ?
- (5) Are the properties embraced by the ijara and the sale deeds set up by the plaintiff, separate and distinct from the properties in suit ?

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- (6) Is the decision in the previous suit between Ahmed Reza and Inayet Hossein binding on the plaintiffs as *res judicata*?
- (7) Do the properties in suit belong to the defendants as their exclusive property in the manner they allege?
- (9) Is the claim for mesne profits excessive? Is it barred as to the year 1899?

The Subordinate Judge was of opinion that the main question for decision was, "whether the properties in suit appertained to the estate of Surjapore, and the ownership in them passes along with that of the estate itself, or are these independent of it?" and finding that it has not been proved that the village of Kutubgunge was held on a mokurari tenure or the remaining properties on a rent-free tenure, he decided in favour of the plaintiffs' title on issues 4 to 7. He was also of opinion that the suit was not barred by limitation, that the plea of *res judicata* was not sustained, and that the plaintiffs were entitled to the mesne profits claimed by them, including those for the year 1899. In the result he decreed the plaintiffs' claim with costs.

The defendants, Asghar Reza and Dilawar Reza, appealed from this decision to the High Court, and a Division Bench of that Court (O'KINEALY and RAMPINI JJ.) affirmed the finding of fact of the Subordinate Judge that there was no separate tenure of the properties alleged to be held rent-free and confirmed the plaintiffs' title to these. As to the Kutubgunge property, the High Court was of opinion that the previous litigation had established that Haidar Reza and Safdar Reza held it on a ryoti tenure with a right of occupancy; that the sale deed of 15th May 1883 did convey Haidar Reza's ryoti interest to the plaintiffs, but that by the sale certificate of 17th December 1894 they had acquired only the zemindari, and not the ryoti, interest of Safdar Reza. The High Court, accordingly, dismissed the appeal in all respects, except so far as it related to Safdar Reza's ryoti as distinguished from his zemindari interest in the Kutubgunge bazar, as to which they dismissed the suit.

On this appeal :

*Cowell* for the appellant (and respondent in the cross-appeal) contended that he and his co-defendant and their predecessors in

title had had adverse possession of the properties in suit since before 1876. No possession was then, or at any time, given to Lutf Ali Khan under his *surpeshgi* lease, nor had he or those holding under him ever obtained possession of the disputed properties. On the proper construction of the conveyances to the respondents, and judging from the conduct of the parties to them, those properties were not intended to pass to the respondents, nor had they ever had possession of them. Haidar Reza's and Safdar Reza's respective shares were not included in Lutf Ali Khan's purchase from Haidar Reza in 1883, nor in his decree against Safdar Reza in the same year. Lutf Ali Khan made no attempt to obtain possession, knowing, it was submitted, that he had no title to them. The appellant's vendors and their predecessors were in possession before the appellant and his co-defendant, and had always dealt with the properties in suit as exclusively their own, independently of their co-sharers in the zemindari of Surjapore. It was submitted, therefore, that with regard to those properties (except as to Kutubgunge) the judgment of the High Court was wrong and should be reversed. As to Kutubgunge, the High Court was right in holding that the respondents were bound by the decision in the previous litigation.

*Phillips* and *DeGruyther* for the respondents (and appellants in the cross-appeal) contended that, with regard to the disputed properties other than Kutubgunge, there were concurrent findings of fact by the two Courts below, and that the only question was as to Kutubgunge. But however that might be, the mortgage transactions of 1876 were intended by the parties to them to include, and, it was submitted, did include, all the interests within the zemindari of Surajpore of which the mortgagors could dispose; and the subsequent sale deeds to Lutf Ali Khan and the respondents were also intended to include all the interests then remaining in the mortgagors, and on their true construction that intention was effected. The Transfer of Property Act (IV of 1882) s. 8 enacts that, unless there is an independent tenure, everything passes by a transfer where the transferor conveys "as owner" and no reservation is made. It is for the appellant, who contends that the disputed properties

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did not pass under the words of the transfers, to show that they did not. There being no express words showing an intention to retain Safdar Reza's interest in Kutubgunge, it would pass under the deeds; and the High Court was wrong in holding that the respondents were bound by *res judicata* as to that property

*Cowell* replied.

The judgment of their Lordships was delivered by

**LORD LINDLEY.** The question to be determined on these appeals is the right of the plaintiffs (respondents in the first appeal) to four properties in the possession of the defendants. The Subordinate Judge decided in favour of the plaintiffs. Two of the defendants appealed to the High Court, which affirmed the decision as to three out of the four properties, but reversed it as to the fourth. One of the two defendants who appealed to the High Court has appealed to His Majesty in Council from this decision, so far as it is adverse to him; and the plaintiffs have appealed from it, so far as it is adverse to them.

As to three out of the four properties, both Courts were in favour of the plaintiffs; but as to the fourth, the High Court considered that the title was *res judicata*, and on that ground, and that only, they differed from the Subordinate Judge.

Passing over this question for the present, their Lordships are of opinion that the plaintiffs have established their title to all four properties. The defendants showed no prior title of their own. They relied on possession and lapse of time, and the first appellant relied further on conveyances subsequent to those under which the plaintiffs claim. Adverse possession for 12 years before the commencement of this action was not proved, and the conveyances relied upon by the first appellant conveyed no title by reason of the prior conveyances to the plaintiffs. This was the view taken by both Courts in India, and were it not for the cross-appeal and the defence of *res judicata* as to one of the four properties, their Lordships would not think it necessary to say more. They would simply dismiss the first appeal.

The defence of *res judicata* and the cross-appeal render it necessary to go a little further into detail. The title of the plaintiffs, who are the respondents in the first appeal, will be

found accurately stated in their case. The following short statement is all that is necessary for the purpose of understanding the defence of *res judicata* :—

The zemindari of Surjapore geographically included all four properties in dispute and formerly belonged to Syad Haidar Reza and Syad Safdar Reza in equal shares. Syad Haidar Reza is the ancestor of the defendants Nos. 3 to 11, who are not appellants. The defendant No. 1, who is the only appellant in the first appeal, is a step-brother of Syad Haidar Reza. In 1876 Syad Haidar Reza and Syad Safdar Reza mortgaged their shares in the zemindari to Syad Lutf Ali Khan. In 1883 Haidar's share and in 1892 Safdar's share was sold to him. The plaintiffs claim through him. The four properties now in dispute are claimed by the plaintiffs as parts of the zemindari, and the main contest in this case turned on whether they were parts of it or whether, as the defendants alleged, they had been severed from it and did not pass to Syad Lutf Ali Khan. Both Courts decided this point in favour of the plaintiffs as to three properties, and their Lordships see no reason whatever for differing from them.

The fourth property in dispute called Kutubgunge was a bazar built many years ago. There was a dispute and litigation (in 1865 and lasting until 1869) about this bazar between the then owners of the zemindari. The proceedings in this litigation are set out in the record, and the history of the bazar appears to be as follows :—It appears that there were two bazars in this zemindari, both built many years ago. One was built by an ancestor of the then defendant, and the profits of this were not divided between the zemindars, but were enjoyed by the defendant and his ancestors. The other, which was then (and is now) in dispute, had been built by a female ancestor of the then plaintiff Ahmed Reza, and was claimed by him as part of his share of the zemindari. It was apparently held under a lease or a succession of renewable leases in respect of which a ground-rent was payable to the zemindars. The question in dispute was who was entitled to the profit rental. Ahmed Reza claimed it all as his. The other zemindar, *i.e.*, the then defendant, claimed a share of it. The decision was in favour of Ahmed Reza. Neither party claimed the bazar as property severed from the zemindari.

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Nor did the Court decide that the land on which the bazar was built was not part of the zemindari estate within which it was locally situate. All that was decided in this litigation was that Ahmed Reza as the successor of the person who had built the bazar was entitled to take for his own benefit the profit rental obtainable from it, and was not bound to share that rental with the other zemindar.

Under these circumstances the plea of *res judicata* might well be a defence to a hostile claim by persons asserting a title under Ahmed Reza's former opponent against those who claim under him. But their Lordships are at a loss to understand its applicability in a dispute between persons all of whom claim under Ahmed Reza himself, as the plaintiffs and the defendants in this case do. The claim under the Statute of Limitations being negatived, the present dispute must turn on the true construction of the conveyances under which the parties respectively claim.

The conveyances to the plaintiffs' ancestor, Syad Lutf Ali Khan, were made in 1883 and 1894, and are set out in the record. The deed of 1883 contains no words of exception or reservation, and is ample in point of language to pass all Syad Haidar Reza's interest in the zemindari, including the land on which the bazar was situate. His interest in the houses on that land and in the profit rents derived from them would pass by the deed in the absence of words showing an intention to retain them.

It is true that in 1890 and 1891, Haidar Reza and his wife sold their share in the bazar to the first appellant, but the prior conveyance to the plaintiffs' ancestor left them no share in this bazar which they could convey to any other person.

The share of Safdar Reza was sold under the decree of the Court, and the sale certificate of the 18th December 1894 shows that all his interest in the property mortgaged by him was sold to the plaintiffs. The description in the certificate is again quite sufficient to pass his interest in the bazar in the absence of any words showing an intention to exclude it.

The result, therefore, is that their Lordships will humbly advise His Majesty to dismiss the appeal of the defendant Syad Ashgar Reza, and to allow the cross-appeal of the plaintiffs and to discharge the decree of the High Court so far as it reversed

the decree of the Subordinate Judge, and to order the appellant Syad Ashgar Reza to pay the costs of that appeal. The other appellant to the High Court is not before the Board and cannot, therefore, be ordered to pay these costs.

The appellant Syad Ashgar Reza will pay the costs of his appeal and of the cross-appeal.

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*Appeal dismissed. Cross-appeal allowed.*

Solicitors for the appellant: *Miller, Smith and Bell.*

Solicitors for the cross-appellants: *Watkins and Lempriere.*

J. V. W.

## REFERENCE FROM BOARD OF REVENUE.

### IN THE MATTER OF A REFERENCE UNDER THE INDIAN STAMP ACT, 1899.\*

1903  
Feb. 28.

*Bill-of-lading—Sea-insurance—Stamp duty—Stamp Act (II of 1899) ss. 2, 7, and Sch. I, Art. 47A—‘Contract for sea-insurance’—‘Policy of sea-insurance.’*

The documents, annexed to the statement of the case referred, are bills-of-lading within the meaning of the Stamp Act (II of 1899), and as such are liable to stamp duty under that Act.

*Sewell v. Burdick* (1) referred to.

When by such a document a Company, for an increased payment, takes upon itself all risks attending goods while on board of a ship or vessel, the document is not a ‘policy of sea-insurance,’ but only a ‘contract for sea-insurance,’ and is not, therefore, liable to be stamped as a ‘policy of sea-insurance’ under the Act.

### REFERENCE under Stamp Act, 1899.

This was a Reference from the Board of Revenue, Lower Provinces, under the provisions of s. 57 of the Indian Stamp Act of 1899, in connection with the liability to stamp duty of

\* Civil Reference, No. 1 of 1903, by the Board of Revenue, dated the 12th February 1903.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Stevens and Mr. Justice Geidt.

(1) (1884) L. R. 10 App. C. 74.

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certain documents issued by the Inland Rivers Steam Navigation Companies. Several forms of these documents were annexed to the statement of the case submitted for the decision of the High Court, of which the first two, known as the red and blue bills, and an ordinary form, are reproduced here for reference.

The statement of the case and the opinion of the Board were in the following terms:—

“1. In January 1900 a request was preferred to the Government of Bengal by the Calcutta Marine Insurance Agents' Association that they might be permitted to issue policies insuring against inland risks without affixing stamps thereto, on the ground that the Rivers Steam Navigation Company and the India General Navigation and Railway Company by the use of what were described as unstamped bills-of-lading did, in effect, in consideration of a payment referred to as ‘additional freight,’ *i.e.*, a rate of freight over and above that charged under the ordinary bill-of-lading for the carriage of the goods only, undertake to cover the risks usually insured against under a policy of Marine Insurance. Since the petitioners represented that these so-called bills-of-lading were in effect policies of sea-insurance under the law, they urged that they were at a disadvantage in business competition with the Carrying Companies, by the fact that the latter escaped the payment of stamp duty upon documents of a nature similar to the policies to which a Company of Marine Insurance was required to affix stamps.

“2. Enquiry having been thus directed to the point, the Board of Revenue, after taking legal opinion, and with the concurrence of the Government of Bengal, held that the so-called bills-of-lading, referred to as issued by the Inland Carrying Companies, were liable to be stamped under Articles 14 and 47A, Schedule I, Act II of 1899, as ‘bills-of-lading’ and ‘policies of insurance,’ and issued orders to the officers charged with the administration of the law, directing them to ensure that stamp duty was in future paid accordingly.

“3. In June 1902 it was again represented by the Calcutta Marine Insurance Agents' Association that the decision of the Board of Revenue as to the liability to stamp duty of the documents in question had not been acted upon by the Inland



Carrying Companies, and that the Companies of Marine Insurance proper continued in consequence to be unfairly handicapped in the conduct of their business. Enquiry having ascertained that the bills-of-lading referred to were in fact still issuing unstamped, the two Steamship Companies concerned were requested to explain. They replied contesting the legal correctness of the decision given by the Board of Revenue that stamp duty could be levied in the cases described, and further reference having been made to the legal advisers of Government, the Board have considered it proper to obtain the authoritative decision of the High Court upon the point at issue.

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“4. Copies of the ordinary bills-of-lading used by the Companies as also of those known as the red and blue bills, which have immediately occasioned the present reference, are annexed herewith. It will be observed that the special bills (except for the fact that that in use by the India General Navigation and Railway Company is in blue type and that by the Rivers Steam Navigation Company is in red) are identical in form. It is distinctly specified upon them that their use by shippers is optional; if the freight charges only are paid in the usual form, the risks of carriage rest with the shippers; if the *ad-valorem* freight is paid upon the value to be declared, in addition to the ordinary freight which is separately set forth, the same risks, subject to certain specified conditions, are borne by the Carrying Companies.

“5. The decision of the Board of Revenue regarding them, as arrived at in 1900, is quoted below:—

‘On referring to the forms of the red and blue bills-of-lading . . . . . it is found that, in consideration of the additional freight, the carrying Companies take upon themselves the liability for the goods from the time they are delivered to them for carriage, until the same are landed, including risk of craft within the ports of shipment and destination to, and from, the vessels. The bills in question also purport to be receipts for goods shipped from one place for delivery at another. As a bill-of-lading freight is paid at one rate, while an additional freight at a different rate is recovered for the insurance of goods until delivery.

‘Such being the character of these bills-of-lading, they come under the definition of ‘bill-of-lading,’ as also of ‘policy of insurance,’ as given in sub-sections 4 and 20 (a) of section 2 of the Indian Stamp Act, II of 1899, and under section 5 of the Act are chargeable with the aggregate amount of stamp duty provided in Articles 14 and 47A of schedule I of the Act.’

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"6. The opposite view which has been urged on behalf of the River Carrying Companies, may be summarised as follows:—

Drawing a distinction between the ordinary and the red and blue forms of bill-of-lading, and representing the hardship, after an immunity extending over some sixty years, of their being called upon to stamp the so-called bills-of-lading in their use, they submitted that the former were not bills-of-lading at all, but merely receipts for cargo, and on the analogy of a railway receipt were not liable to stamp duty, especially seeing that the freight on the goods was recovered on a separate bill form which was stamped when the freight exceeded Rs. 20; whereas railway receipts mention the 'sum paid' and 'to pay,' and bear no stamp at all. It was argued that it was absolutely impracticable to affix stamps to each of these bills-of-lading or cargo receipts, and that it was unknown in the history of inland navigation or railway management that a receipt for goods (or a so-called bill-of-lading) should be stamped. Were the ruling enforced, the anomalous position would arise, in so far as the Companies carried very largely in connection with railways as railway ferries, that while consignments from a railway station to a steamer station would not be carried under a stamped receipt (or so-called bill-of-lading), a consignment from a steamer station to a railway station would be.

It was further stated that railways run ferries of their own precisely as the Companies do for them, carrying on precisely the same trade as they, and yet are exempt from stamping the documents under which the goods are so carried; also that the Postal Department insures parcels to any amount which are in many cases carried by river and by sea, and yet is exempt from stamping its documents either as bills-of-lading or as policies of insurance.

It was mentioned that the two Companies interested had a total of 342 stations, many of them, or in fact the majority, merely mat huts, erected on sand churs. The greater part of the shipments from stations of this description were of small value, and the freight in many cases as low as Re. 1 or even less. The incidence of a tax of four annas for a stamp on the receipt (or so-called bill-of-lading) on such shipments would be very serious: the shipper would have to pay it, and the effect of so doing would be either the restriction of trade or the driving of the trade of the Steamer Companies to the State and State-aided railways, which were under no law as to the stamping of documents. It was represented that ocean bills-of-lading were never signed unless the freight amounted to or exceeded £1 sterling, equal at exchange (1s. 4d.) to Rs. 15.

The difficulty of keeping large stocks of stamped, and, therefore, valuable documents, at the outlying places occupied by the Companies' stations was also pressed, and it was submitted that bills-of lading, properly so called, were confined to marine adventures, and that the instruments used by the Companies as inland carriers as bills-of-lading were mere receipts for goods, without any of the other incidents and legal effects of bills-of-lading proper.

It was pointed out that there was no definition of a bill-of-lading in the Stamp Act, but that section 2, clause 4 of the Act ran as follows:—

'Bill-of-lading includes a through bill-of-lading, but does not include a mate's receipt.'

It was argued that the reference to a 'mate's receipt,' which had no application to inland navigation, coupled with the omission of the definition from the

Act, indicated the exclusion of such receipts or so-called bills-of-lading used in inland navigation from the operation of the Stamp Act, and thus brought it into accord with the English law under which (54 and 55 Vict., Chapter 39) a bill-of-lading for any goods, merchandise or effects to be *exported or carried coastwise* (i.e., not for inland navigation) was required to be stamped. There being no definition of a bill-of-lading in the Indian law, it was argued that reference should be made to the English Law on the subject for what was meant by the same, and that the word was exclusively there used with reference to sea-going vessels. Doubt was expressed whether a bill-of-lading, properly so called, had any application to inland navigation.

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From Smith's *Mercantile Law*, page 342, the following passage was quoted:—

'There is some doubt whether a bill-of-lading, properly so called, be not confined to marine adventures, and whether an instrument so worded given by a boat-master in a canal navigation would operate in any way except as a receipt or memorandum.'

It was submitted that there being so much doubt in the matter, the inland carriers were entitled to the benefit of such doubt, and that the Indian Stamp Act, like all the fiscal statutes, should be construed strictly.

As to the red and blue bills-of-lading, in respect of which it was demanded that they should bear stamps both as bills-of-lading and as policies of insurance, the analogy of the railway receipt was again urged. It was represented that railways have different receipt forms for—

(a) Goods at owner's risk, | (b) Goods at railway risk, | (c) An 'insured receipt,' and that a lower rate of freight was charged for (a) than for (b), while (c) was charged at a much higher rate than either (a) or (b). But in no case was the receipt liable to stamp duty.

In the case of the risks undertaken by the Companies under the red and blue bill-of-lading, it was represented that the policies under which the said risks were covered were separate documents and had been properly stamped. The values declared in the red and blue bill-of-lading were actually simple declarations of risks incurred under these policies, and were actually declared to the underwriters upon them. The policy stamp duty has thus *been paid*, and it was not reasonable that it should be paid again on the so-called bill-of-lading.

"7. While solely concerned, at present, with the question of the liability of the documents to stamp duty under the law as it stands, and discarding therefore as irrelevant the arguments of the Companies as to their practical difficulties in complying with the law and as to the anomaly of their position in comparison with Railways, the Board are of opinion that a reasonable doubt has been shown to exist as to the correctness of their decision of 1900, regarding which the decision of the Honourable High Court may properly be sought.

C. E. BUCKLAND,

Member of the Board of Revenue, L. P."

The 12th February 1903.

Challan No.

Dated this

day of

190

Commander of Flot.

Master of Steamer.

This bill-of-lading is issued at an *ad-valorem* freight whereby the Company take risks upon themselves.

N.B.—A form of bill-of-lading at a lower freight under which risks are borne by the Shippers is also issued.

It is at the option of the Shippers which form they adopt.

Value declared by the Shippers on
which additional freight is paid }

Principles

Additional freight

Total ...

INDIA GENERAL NAVIGATION AND RAILWAY COMPANY, LIMITED,
AND RIVERS STREAM NAVIGATION COMPANY, LIMITED.

| Register
Number. | Number of packages and contents
as declared by Shipper. | Measure-
ment. | SAID TO WEIGH | | Rate. | Amount. | |
|---------------------|--|-------------------|---------------|---------|-------|---------|---|
| | | | Mds. | Srs. C. | | | |
| | | | | | | | Shipped by
(INDIA GENERAL NAVIGATION AND RAILWAY
COMPANY, LIMITED
RIVERS STREAM NAVIGATION COMPANY'S, } Ongo.
LIMITED, |
| | | | | | | | FLAT
in tow of the steamer
(or whatever other steamer may tow the said flat), whereof
is Master for
the present voyage to
now at
in the River
packages of sundry goods described and marked as per margin,
and which are received subject to the conditions endorsed
hereon, to be delivered for and on account of, and at the risk
of the Shipper, to
or to this Company's Agent at
or as near thereto as the state of the River
will permit.
In witness whereof, the Managing Agents have set their
hands to one bill-of lading of this tenor and date.
Dated this 190 .
Shipped on board (as per the Commanding Officer's Gangway
Book).
Managing Agents.
Commander of Vessel. |

The Company will not be responsible in the event of perishable goods, such as Onions or Vegetables of any kind, becoming decomposed and having to be thrown overboard, as to contents.

The Advocate-General (Mr. J. T. Woodroffe) in support of the reference. The question is whether these documents are bills-of-lading. I submit they are so. These Companies are only common carriers. Referring to the forms of the red and blue bills-of-lading, we find that these Companies, in consideration of the additional freight, take upon themselves all risks until the goods are landed at their destination. That being so, these documents come under the definitions of "bills-of-lading" and "policies of insurance" in s. 2, sub-ss. 4 and 20 (a) of the Indian Stamp Act (II of 1899); and, as such, they are chargeable with the aggregate amount of stamp duty: see *Bryans v. Nix*(1) and *Ohogemul v. The Commissioners for the Improvement of the Port of Calcutta*(2).

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Mr. Hill (Babu Prosonno Gopal Roy with him) for the Rivers Steam Navigation Company (*contra*). These documents are not bills-of-lading. The Stamp Act of 1899 does not define a bill-of-lading; but s. 2, cl. 4 says that a bill of lading includes a through bill of lading, but does not include a mate's receipt. The term "bill of lading" is applied to an instrument signed by the master of a vessel passing along the high seas: see the case of *Bryans v. Nix*(1). The Government itself has put a construction upon the term by not levying any stamp duty for the last 60 years. In order to determine whether any, and if any what, stamp duty is chargeable upon an instrument, the legal rule is that the real and true meaning of the instrument is to be ascertained; and that the description given on the instrument itself is immaterial: see *Limmer Asphalt Paving Company v. Commissioners of Inland Revenue*(3) and *Mortgage Insurance Corporation v. Commissioners of Inland Revenue*(4). The construction ought to be in favour of exemption: see *Kishori Lal Roy v. Sharat Chunder Mozumdar*(5), *Ranier v. Gould*(6) and *Anonymous case*(7). The next point is whether these documents are "policies of sea-insurance" under the Stamp Act. I submit they are not. On referring to s. 7 of the Stamp Act of 1899, we see that they

(1) (1839) 4 M. & W. 775.

(4) (1888) L. R. 21 Q. B. D. 352.

(2) (1891) I. L. R. 18 Calc. 427, 442.

(5) (1882) I. L. R. 8 Calc. 593.

(3) (1872) L. R. 7 Ex. 211, 214.

(6) (1839) I. L. R. 13 Mad. 255.

(7) (1884) I. L. R. 10 Calc. 274, 282.

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are not policies of sea-insurance; they are mere contracts for insurance. In the case of *Limmer Asphaltic Paving Company v. Commissioners of Inland Revenue*(1) it has been held (at page 217) that there is no better rule as regards stamp duty than that the instrument should be stamped for its leading and principal object, and that this stamp duty covers everything accessory to its object.

*The Advocate-General* in reply. A bill-of-lading is a receipt for goods: see *Sewell v. Burdick*(2). As such, the present documents are bills-of-lading and must be stamped. If it is a contract for sea-insurance, it should be taken as a policy of sea-insurance, having regard to s. 2, cl. 19 (a) of the Stamp Act of 1899.

**MACLEAN C.J.** Two points have been referred to us by the Board of Revenue—*first*, whether certain documents which are annexed to the statement of the case are bills-of-lading within the meaning of the Stamp Act of 1899, and, as such, liable to stamp duty under that Act; and, *secondly*, whether, in those cases where for an increased payment the Company takes all risk, they are liable to be stamped as policies of sea-insurance under that Act.

Upon the first point, I think these documents are bills-of-lading within the meaning of the Act. It is said they are not, because they do not relate to the carriage of goods by a “sea-going vessel,” but to inland navigation only. They come within the definition of a bill-of-lading as laid down by Lord Bramwell in the case of *Sewell v. Burdick*(2). I do not think that the fact that they relate to the carriage of goods by inland navigation can alter the nature and character of the document. We have been referred to a passage in Smith’s Mercantile Law, in which a doubt is expressed whether a bill-of-lading, properly so called, be not confined to a marine adventure, and whether an instrument so worded given by a boat-master in a canal navigation would operate in any way except as a receipt or memorandum, and reference is made to the case of *Bryans v. Nix*(3). The judgment in that case hardly supports this view. Baron Park, in

(1) (1872) L. R. 7 Ex. 211.

(2) (1884) L. R. 10 A. C. 74, 105.

(3) (1839) 4 M. & W. 775.



delivering the judgment of the Court in that case, says: "We think it unnecessary to decide whether the instruments were regular bills-of-lading, so as to have all the properties which the custom of merchants has attached to these documents. We need not say, whether, like bills-of-lading, they are the symbols of property, so that their transfer by endorsement is equivalent to an actual delivery of the goods, which they represent in *specie*; nor whether they have the privileges which by the Factors Act are given to such instruments."

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A vast amount of trade is carried on over the inland navigation of India, as compared with that of England, and we may fairly take this into consideration.

In my opinion stamp duty was payable upon these documents as bills-of-lading.

As regards the second point, I do not think it is. These documents are not policies of sea-insurance. Stamp duty can only be claimed under Article 47A of Schedule I to the Stamp Act, which says:—"Policy of Insurance—A. Sea-Insurance (see section 7)."

If we look at section 7, that section says:—"No contract for sea-insurance shall be valid unless the same is expressed in a sea-policy," and it tells us what a sea-policy must contain. Can we say that this document is a sea-policy? I think not. Having regard to the last sub-section of sub-section 20 of section 2, this document cannot be put higher than a contract for sea-insurance. That sub-section says:—"Where any person, in consideration of any sum of money paid or to be paid for additional freight or otherwise, agrees to take upon himself any risk attending goods, merchandise or property of any description whatever, while on board of any ship or vessel, or engages to indemnify the owner of any such goods, merchandise or property from any risk, loss or damage, such agreement or engagement shall be deemed to be a contract for sea-insurance." This is what has occurred in the present case. A contract for sea-insurance is one thing and a policy of sea-insurance is another. As I have pointed out, under Article 47A, the stamp duty is payable only upon a policy of sea-insurance under section 7, and this document does not come within that section. An Act of this nature must be construed strictly.

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In my opinion stamp duty is not payable on these documents as policies of sea-insurance.

**STEVENS J.** I am of the same opinion.

**CHIT J.** I am also of the same opinion.

S. C. G.

## APPELLATE CIVIL.

1908  
March 20.

GANGA RAM MARWARI

v.

SECRETARY OF STATE FOR INDIA.\*

*Notice—Land Acquisition Act (X of 1870), ss. 9, 16, 40—Persons known or believed to be interested—Power to take possession—Vesting of land absolutely in Government.*

Land acquired under the provisions of Act X of 1870 vests absolutely in the Government, free from all encumbrances, after a *bond-fide* award or reference by the Collector has been made and possession taken, even when no special notice, as required by s. 9 of the Act, has been served on persons known or believed to be interested therein.

*North London Railway Company v. Metropolitan Board of Works*(1) and *Galloway v. Mayor and Commonalty of London*(2) referred to.

APPEAL by the defendant, Ganga Ram Marwari.

The suit was for possession of a plot of land acquired by the Government, under the provisions of the Land Acquisition Act (X of 1870) for the construction of public latrines by the East Indian Railway Company. It was alleged by the plaintiff that the defendant was repeatedly called upon verbally to give up possession of the land, but that he did not do so. The defendant alleged that as he had a permanent *jemat* right in the land in suit, and as he was no party to the land acquisition proceedings,

\* Appeal from Appellate Decree No. 799 of 1900, against the decree of B. L. Gupta, District Judge of Burdwan, dated March 3, 1900, affirming the decree of Bhaba Charan Mukerjee, Munsif of Ranigunge, dated Aug. 3, 1899.

(1) (1859) 28 L. J. Ch. 909.

(2) (1866) L. R. 1 H. L. 34.

not having been served with any notice of the same as required by law, and having no knowledge thereof, he was not bound by them; and that therefore the plaintiff could not be said to have acquired the land in suit.

The Munsif found that a declaration was published under s. 6 of the Act in which the land in suit was referred to, there was measurement of the land under s. 8, notices were issued under s. 9, there was "an enquiry into the value and claims as required by law, and then there was a reference to the Court under s. 15, and finally an award by the Judge; and that the Collector took possession. It was, however, found that there was no evidence to show that a notification, as required by s. 4, was published, and that no special notice, as required by s. 9, was served on the defendant, although his name appeared in the schedule of lands prepared by the Sub-Deputy Collector, but was omitted, apparently by mistake, from the final report prepared later on. Upon these findings the Munsif held that the omissions did not prevent the land in suit from vesting absolutely in the Government under s. 16 of the Act, and he accordingly decreed the suit.

The decree of the Munsif was confirmed on appeal by the District Judge.

*Dr. Rish Behary Ghose and Babu Digambur Chatterjee* for the appellant.

*Senior Government Pleader (Babu Ram Charan Mitter)* for the respondent.

**BAKERJEE AND HENDERSON JJ.** In this appeal, which arises out of a suit brought by the plaintiff-respondent, the Secretary of State for India in Council, against the defendant-appellant, for possession of a plot of land, which had been acquired by the plaintiff under the Land Acquisition Act (X of 1870), the only question raised on behalf of the appellant is, whether the Court of Appeal below was right in holding that, under section 16 of Act X of 1870, the land vested absolutely in the Government, free from all encumbrances, when no special notice, such as is required by section 9 of the Act to be served on

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all persons, known or believed to be interested, had been served on the appellant.

The learned vakil for the appellant contends that this question should be answered in the negative, because the service of special notice on all persons known or believed to be interested is a condition precedent to the making of an award or of a reference to the Civil Court by the Collector and to his taking possession, after which alone can the land vest in the Government under section 16 of the Act, and that as the Lower Appellate Court has found that no such notice was served on the appellant, who was known to be interested in the land acquired, the subsequent proceedings in the land acquisition case must be deemed to have been *ultra vires* and inoperative in affecting the rights of the appellant. It is urged that, in a matter like this, the requirements of the Act should be strictly complied with, and that the objection as to the non-service of special notice is not a mere technical objection, as it is only after such notice that a person can become aware of the land acquisition proceedings and appear and see that the compensation is properly assessed. And in support of this contention the cases of *Herron v. Rathmines and Rathgar Improvement Commissioners*(1) and *North Shore Railway Company v. Pion*(2), Maxwell on the Interpretation of Statutes, p. 419, and Cripps on the Law of Compensation (3rd edition), p. 78, are relied upon.

On the other hand, the learned Senior Government Pleader argues that the scheme of the Land Acquisition Act is to make the land acquired vest absolutely in Government where possession has been taken after a *bonâ-fide* award or reference by the Collector, even though all persons interested have not had notice, the remedy of a person in the position of the defendant being one under section 40 of the Act; and as the *bonâ fides* of the Collector's proceedings, having regard to the facts found, cannot be called in question, the suit has been properly decreed.

After considering the facts found by the Lower Appellate Court and the arguments on both sides, we are of opinion that

(1) [1892] A. C. 498, 532.

(2) (1899) L. R. 14 A. C. 612.

the question raised in this appeal, as stated above, must be answered in the affirmative.

The facts found by the Lower Appellate Court are that all the preliminary steps, including the taking of possession, had been duly taken, with only this exception, that by some mistake the name of the defendant was omitted from the report of the Sub-Deputy Collector, and no special notice was issued to him, but that he had knowledge of the proceedings under the Act, though he did not appear, because he said, on being warned by a friend, that no notice had been served on him. The *bonâ fides* of the proceedings under the Act have not been, and cannot be, questioned in this case.

These being the facts found, let us see what the bearing of the law is upon them. The Land Acquisition Act (X of 1870) evidently contemplates the valid acquisition of land and its absolute vesting in Government after a *bonâ fide* award or reference by the Collector has been made and possession has been taken, notwithstanding that persons interested may not have had notice. This is clear, not only from section 40 of the Act, which provides the proper remedy for persons interested who have not had proper notice, and also from section 9 itself, which is relied upon by the other side: for the very provision that persons known or believed to be interested are to have notice shows that persons interested who are not known or believed to be interested may not have notice, and yet the proceedings may go on validly. Where it is known or believed that a person is interested and yet the Collector wilfully and perversely refuses to give him notice, there his proceedings cannot be considered *bonâ-fide* and should be held to be colourable and therefore inoperative in vesting the land in the Government, as was held in the somewhat analogous case of *Luchmeswar Singh v. Chairman of the Darbhanga Municipality*(1). But where through mere inadvertence or mistake a person interested has not had notice served upon him, the reason for the non-service is rather allied to ignorance of the fact of his being interested than to any wilful perversity; and that was the case here. If there was any wilful negligence on any side in this case, one might well say it was on the side of the defendant.

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(1) (1890) I. L. R. 18 Calc. 99; L. R. 17. I. A. 90.

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Although he was aware of the proceedings and was warned by a friend that he ought to appear, he refused to do so and took his stand on the ground that no notice had been served upon him. We are of opinion that so far as the provisions of the Act go, there has been a substantial compliance with them, and that there is no sufficient reason for holding that the vesting of the land in the Government under section 16 has not taken place.

As for the authorities cited, they are, in our opinion, inapplicable to this case. They relate to cases of privileges of an exceptional character to interfere with the property and rights of others being vested in private persons, or bodies of persons by statute law, and in such cases the strictest compliance with the requirements of the statute has been rightly held to be a necessary condition precedent to the exercise of the powers and privileges conferred. In cases under the Land Acquisition Act (X of 1870) the proceedings are required to be conducted, and the powers and privileges conferred are required to be exercised, not by any private or even public body of persons, but by a responsible officer of Government of the rank of a Collector, and the chances of neglect to observe rules from interested motives are reduced to the narrowest limits. That being so, the principle of law underlying the authorities cited could not apply, at least in its entirety, to the case before us. A distinction such as we have adverted to is observed by the English Courts, as will appear from the observations of Vice-Chancellor Wood in the case of *North London Railway Company v. Metropolitan Board of Works*(1) and the observations of Lord Cranworth in the case of *Galloway v. Mayor and Commonalty of London*(2), and we may also refer in this connexion to Maxwell on the Interpretation of Statutes, pp. 421, 422, and Cripps on the Law of Compensation, p. 21.

For all these reasons, we are of opinion that the decree appealed against is correct and should be affirmed, and that this appeal must be dismissed with costs.

M. N. R.

*Appeal dismissed.*

(1) (1859) 23 L. J. Ch. 909.

(2) (1866) L. R. 1 H. L. 34.

## APPELLATE CIVIL.

GUNINDRA PROSAD

*v.*

JUGMALA BIBI.\*

1903

May 1.

*Succession Certificate—Succession Certificate Act (VII of 1889), object of.*

The object of the Succession Certificate Act (VII of 1889) is to obtain the appointment of some one to give a legal discharge to debtors to the estate for the debts due, and not to have nice and intricate questions of law as to the rights of parties to the estate of the deceased decided, on an application under it.

APPEALS by the objector, Gunindra Prosad.

These two appeals arose out of two applications for certificates under the Succession Certificate Act. The parties were Jains. In one of the cases Musammat Jugmala Bibi and Musammat Jugmohun Bibi were the applicants, and in the other case Gunindra Prosad was the applicant. The allegation of the said Musammats were that their mother, Musammat Sham Soonder Koer, died leaving certain debts due from certain persons, which, according to Hindu Law being their mother's *stridhan*, they as daughters were entitled to get.

Their application for the succession certificate was opposed by Gunindra Prosad, their brother, on the grounds that these debts were not the *stridhan* of the deceased Musammat Sham Soonder Koer; and that even if they were so, the family being a Jain family, the inheritance would be governed by custom. Gunindra Prosad also made a separate application for a certificate under the Succession Certificate Act. Both these applications were dealt together by the District Judge of Arrah, who refused to enter into the intricate questions of law, and granted a certificate under the Act to the Musammats. The material portion of the learned Judge's judgment was as follows:—

"It has been held that, in the absence of proof of custom, the Jains must be regarded as governed by ordinary Hindu Law, and this is certainly not the case for us to enquire into Jain customs.

\* Appeals from Orders Nos. 381 and 409 of 1901, from the orders of H. R. H. Cox, District Judge of Arrah, dated July 25, 1901.

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"It has been held that enquiries must be made in these cases, but the decisions quoted all refer to cases when the facts were disputed. That is not the case here. Both parties admitted the relationships alleged. All that is in dispute is the law governing them. Without for a moment pretending to lay down what law should govern the descent, I think, that I clearly ought to follow the Mitakshara in a summary proceeding like this, taking ample security for the safety of the property."

*Dr. Rash Behary Ghosh and Babu Suligram Singh* for the appellant.

*Mr. C. P. Hill, Babu Satis Chunder Ghose, Babu Makhan Lall and Babu Krishna Prasad Sarbadhichary* for the respondents.

**MACLEAN C. J.** I do not think we ought to interfere on these appeals. It is difficult for us to decide the question of the strict right to the succession certificate without determining questions of law which are obviously intricate and difficult, and not such as can be properly decided upon a summary proceeding such as the present. The object of the Succession Certificate Act is to obtain the appointment of some one to give a legal discharge to debtors to the estate for the debts due. It was not, I think, intended that nice questions of law as to the rights of parties to the estate of the deceased should be decided on an application under it. It is reasonably clear that the persons now appointed have *prima facie* the best right to a grant of a certificate, but in saying this I am not to be taken as deciding anything as to the ultimate rights of the parties in the estate. These, if disputed, will probably have to be decided in a regular suit. Under these circumstances I do not think we ought to interfere. The appeals are dismissed. We make no order as to costs.

**GRANT J.** I concur.

S. C. O.

*Appeals dismissed.*



## FULL BENCH.

GONESH DAS BAGRIA

v.

SHIVA LAKSHMAN BHAKAT.\*

1908  
Feb. 13.

*Rateable distribution—Execution of decree—Civil Procedure Code (Act XIV of 1882) s. 295.—Proportionate distribution of sale-proceeds—Decrees against the same judgment-debtor—Suit for refund of assets distributed.*

B obtained a decree against three judgment-debtors—X, Y and Z. A obtained a decree against X and Y only:—

*Held*, that A is entitled under the provisions of s. 295 of the Code of Civil Procedure to a proportionate distribution of the assets realised by the sale of a property of X, Y and Z, so far as they represent the share of his own judgment-debtors X and Y in that property.

*Deboki Nunjun Sen v. Hart* (1) overruled.

REFERENCE to a Full Bench, in second appeal by the plaintiffs, Gonesh Das Bagria and another.

The defendant No. 1 had obtained a decree against the *pro forma* defendants Nos 3 to 5, and in execution of it a certain sum of money was realised by the sale of immoveable properties belonging to them jointly. The defendant No. 2, in execution of a decree obtained by him against these three defendants, applied for a rateable division of the proceeds of the execution sale, under section 295 of the Code of Civil Procedure. The plaintiffs also, who had taken out execution of a decree obtained by them against the *pro forma* defendants Nos 3 and 4 only, applied for a rateable division of the said proceeds under the same section of the Code. But the Court rejected their application, and directed the proceeds of the execution sale to be rateably divided amongst the defendants Nos. 1 and 2.

\* Reference to Full Bench, in appeal from Appellate Decree No. 1295 of 1899.

*Full Bench*: Sir Francis W. Maclean, K. C. J., Chief Justice, Mr. Justice Prinsep, Mr. Justice Sale, Mr. Justice Stevens and Mr. Justice Geidt.

(1) (1885) I. L. R. 12 Calc. 294.

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Thereupon the present suit was instituted by the plaintiffs under the penultimate clause of section 295, to compel the defendants Nos. 1 and 2 to refund the assets that had been paid to them in excess of their own shares, and which, it was alleged, was due to the share of the plaintiffs. The Munsif decreed the suit; but on appeal by the defendant No. 1, the Subordinate Judge held that the plaintiffs were not entitled to claim a refund of the assets, and set aside the decree of the Munsif so far as the defendant No. 1 was concerned.

The appeal to the High Court originally came on for hearing before a Division Bench (MACLEAN C. J. and BANERJEE J.); and their Lordships, entertaining a view in conflict with that expressed in the case of *Deboki Nundun Sen v. Hart*(1), referred the case to a Full Bench, on the 5th August 1902, with the following opinions :—

MACLEAN C.J. Two points are raised upon this appeal: the first is that the suit is not maintainable, and the second is that if the suit is maintainable, the plaintiff is not entitled to the relief which he seeks. In connection with the first point, there is a subsidiary point, namely, that the plaintiff, even if he is entitled to bring a suit, is premature in so doing.

The suit is one asking for a refund of certain moneys which have been paid under the provisions of section 295 of the Code to the principal defendant who appears before us to-day. The position is this. The principal defendant obtained judgment against three judgment-debtors, say X, Y and Z. The present plaintiff obtained a judgment against X and Y only, and he contends that under the provisions of section 295 of the Code he is entitled to a proportionate distribution of the moneys realized by the sale of the property of X, Y and Z, so far as those moneys represent the share of his own judgment-debtors X and Y in that property. The principal defendant replies that he is not so entitled, because he does not bring himself within the provisions of section 295, inasmuch as the decrees are not against the *same* judgment-debtor. The question we have to decide is whether the plaintiff is entitled as he claims.

Here I may conveniently refer to the subsidiary point, namely, that the suit is in any event premature. It is said that it has not been shown that the moneys ordered to be paid by the order of the 19th of September 1896 have been paid over to the principal defendant, and that, unless this has been done, the plaintiff cannot be entitled to bring a suit for a refund under section 295, and that the suit is premature and ought to be dismissed. This point has never been taken until the present moment. I am not saying that it cannot be taken so long as the suit is alive; but I think we ought not to accede to the contention because there is no evidence before us that the money has not been drawn out by the principal defendant. The Munsif says: "That point was not suggested in the petition of the

(1) (1885) I. L. R. 12 Calc. 294.

8th September last. There is, besides, no evidence before me in support of that plea." No doubt, in subsequent observations, he suggests reasons for saying that the money has not been drawn out, but I think, we must take it, there is no finding by the Lower Appellate Court to support that plea. As regards the right to bring a suit, that has not been now disputed.

The only other point then is whether, having brought the suit, the plaintiff is entitled to the relief he seeks.

In the case of *Deboki Nundun Sen v. Hart* (1), it was distinctly held by a Division Bench of this Court that, inasmuch as the decree was not against the same judgment-debtor, the plaintiff, in a case such as is substantially the present, was not entitled to claim under section 295 to share rateably in the sale-proceeds. Although the same point was not distinctly decided in the case of *Hury Doyal Guho v. Din Doyal Guho* (2) and in *Shumbhoo Nath Poddar v. Luckynath Dey* (3), the principle of those decisions would seem to clash with the view taken in the case of *Deboki Nundun Sen v. Hart* (1). With every respect to the learned Judges who decided the latter case, I think the view taken by them placed too narrow a construction on the expression "the same judgment-debtor" in section 295. If the language of the section be absolutely clear, the circumstance that such a construction as was put upon it in that case may lead to injustice or to anomaly or to hardship, could not prevent us from putting such construction upon it. But looking at the whole of section 295, and especially to that portion of it which deals with the distribution of the assets, where it speaks of 'the judgment-debtor,' not using the expression 'the same judgment-debtor,' and to the equitable distribution which is aimed at by the section, I am disposed to think that the construction put upon it by the case of *Deboki Nundun Sen v. Hart* (1) is too narrow. In one sense, if there is a decree against X, Y and Z and also a decree against X and Y, to some extent, at any rate, the judgment-debtors are the same.

Entertaining this view, which is in conflict with that expressed in the case (1) to which I have referred, we must, I think, refer the case to a Full Bench; and as the matter will come up again for further discussion, I have not gone so fully into the authorities as otherwise I probably should have done. In my view the plaintiff is entitled to a rateable share of so much of the sale-proceeds as represents the share of his own judgment-debtors in the whole property sold.

BANNERJEE J. I concur with the learned Chief Justice in thinking that this case should be referred to a Full Bench. My reason for not agreeing with the view taken in the case of *Deboki Nundun Sen v. Hart* (1) may be shortly stated thus:—If A holds a decree against two persons X and Y, and B holds a decree against only one of them (X), in so far as the decrees are both decrees against X, they are decrees against the same judgment-debtor; and if both A and B have applied for execution of their decrees and have not obtained satisfaction thereof, and assets are realized by the sale of any property, either of X alone or of X and Y, at the instance of the decree-holder B or of the decree-holder A, the other decree-holder may well say, so far as the assets are realized by the sale of the property of the judgment-debtor X, that he is entitled to rateable

(1) (1885) I. L. R. 12 Calc. 294.

(2) (1883) I. L. R. 9 Calc. 479.

(3) (1883) I. L. R. 9 Calc. 920.

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distribution. That it is not necessary that the decrees should be against identically the same judgment-debtors is clear from the cases of *Shumbhoo Nath Poddar v. Luckynath Dey*(1) and of *Sarat Chandra Kundu v. Doyal Chand Seal*(2), and I do not think that the language of section 295 requires that the judgment-debtors in the two decrees should be identically the same. The case, in my opinion, comes sufficiently within the language of the section, if the judgment-debtors or some of them are the same in the two decrees, and if any property belonging to the common judgment-debtors under the two decrees has been sold. The language of section 295 is not against this view, nor is there anything in reason to clash with the same view. If property belonging to X be sold at the instance of the second decree-holder B in the hypothetical case I have stated above, and A, the holder of the decree against X and Y, can claim rateable distribution, there is no reason why when property belonging to X and Y jointly is sold at the instance of the decree-holder A, B should be held disentitled to claim a rateable share in the sale-proceeds so far as they arise from the sale of the property belonging to X. I may add that the decision of the Privy Council in the case of *Shankar Sarup v. Mejo Mal*(3), though not overruling the decision in *Deboki Nundun Sen v. Hart*(4), goes to show that some of the reasons for the decision in the lastmentioned case can no longer be accepted as valid.

*Babu Prasanna Chandra Roy* for the appellants. The decision depends upon the wording of s. 295. The word *same* occurs in the first paragraph, but is omitted from the 4th clause of proviso (c). The view set out in the order of reference is consonant with justice, and serious consequences would result from the contrary view. Assuming for the sake of argument that the executing Court cannot go into the question of shares of different judgment-debtors, that difficulty does not arise when a regular suit is brought, as in the present case. The following cases were referred to:—*Shumbhoo Nath Poddar v. Luckynath Dey*(1), *Hart v. Tara Prasanna Mukherji*(5), *Gogaram v. Kartick Chunder Singh*(6), *Wooma Moyee Burmonya v. Ram Buksh Chetlanghee*(7), *Gowri Prosad Kundu v. Ram Ratan Sircar*(8), *Deboki Nundun Sen v. Hart*(4), *Delhi and London Bank v. Uncovenanted Service Bank, Bareilly*(9), *Nimbaji Tulsiram v. Vadia Venkati*(10), *Sarat Chandra Kundu v. Doyal Chand Seal*(11), and *Shankar Sarup v. Mejo Mal*(3).

(1) (1883) I. L. R. 9 Calc. 920.

(2) (1899) 3 C. W. N. 368.

(3) (1901) I. L. R. 23 All. 313:  
 L. R. 28 I. A. 203.

(4) (1885) I. L. R. 12 Calc. 294.

(5) (1885) I. L. R. 11 Calc. 718.

(6) (1863) 9 W. R. 514.

(7) (1871) 16 W. R. 11.

(8) (1886) I. L. R. 13 Calc. 159.

(9) (1887) I. L. R. 10 All. 35.

(10) (1892) I. L. R. 16 Bom. 683.

(11) (1899) 3 C. W. N. 363.

*Babu Lal Mohan Das*, for the respondent, referred to the Indian Contract Act, s. 262, and *Nimbaji Tulsiiram v. Vadia Venkati*(1).

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**MACLEAN C.J.** The only point we have to deal with on the present reference is that which has been referred and no other. The question arises in this way:—"The principal defendant obtained judgment against the judgment-debtors, say X, Y and Z. The present plaintiff obtained a judgment against X and Y only, and he contends that, under the provisions of section 295 of the Civil Procedure Code, he is entitled to a proportionate distribution of the moneys realized by the sale of the property of X, Y and Z, so far as those moneys represent the share of his own judgment-debtors X and Y in that property. The principal defendant replies that he is not so entitled, because he does not bring himself within the provisions of section 295, inasmuch as the decrees are not against the *same* judgment-debtor. The question we have to decide is whether the plaintiff is entitled as he claims." The whole question turns upon whether, under such circumstances, the case falls within section 295 of the Code. I was a member of the Court which referred the case, and for the reasons which I gave in my judgment, which it is unnecessary to repeat, and also for those which are very clearly stated by my colleague, Mr. Justice Banerjee, I consider that the question ought to be answered, as we then answered it, in the affirmative.

**PRINSEP J.** I am also of opinion that this is a case which may properly come under section 295 of the Code of Civil Procedure, in which the claims of two rival judgment-creditors may be adjusted and satisfied.

**SALL J.** I also agree in thinking that the case falls under section 295 of the Code of Civil Procedure, and may be dealt with under that section.

**STEVENS J.** I am also of the same opinion.

**GEIDT J.** I am also of the same opinion.

(1) (1892) I. L. R. 16 Bom. 683.

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**MACLEHAN C.J.** The result is that the decree of the lower Court is set aside and this appeal allowed with costs in all Courts, including the costs of this reference.

M. N. R.

*Appeal allowed.*

## CIVIL RULE.

1903  
 April 18.

HALADHAR MAITI  
 v.  
 CHOYTONNA MAITI.\*

*Jurisdiction—High Court, power of, to review orders passed without jurisdiction in the Presidency Small Cause Court—Bench consisting of the Chief Justice and another Judge—Charter Act (24 & 25 Vict c. 104) ss. 14, 15—Registrar, Presidency Small Cause Court, jurisdiction of—Ex-parte decree for default—Civil Procedure Code (Act XIV of 1882) s. 622—Rules 63, 70, 92, 94 (framed by the High Court) under s. 9 of the Presidency Small Cause Courts Act (I of 1895).*

By virtue of the power conferred under s. 14 of the Charter Act (24 and 25 Vict. c.104), the Chief Justice by constituting a Division Court consisting of himself and any other Judge of the High Court, can deal with applications against an order made by the Presidency Small Cause Court.

*Shamsheer Munshi v. Ganendra Narain Mitter*(1) explained.

The Registrar of the Presidency Small Cause Court has no jurisdiction to entertain an application for new trial to set aside an *ex-parte* decree made by him for default.

RULE granted to the defendants, Choytonna Maiti and another, under s. 622 of the Code of Civil Procedure, and s. 15 of the Letters Patent.

The plaintiff Haladhar Maiti brought a suit in the Presidency Small Cause Court for recovery of a certain sum of money as price of goods sold to the defendants, Choytonna Maiti and another.

\* Civil Rule No. 914 of 1903, against the order of F. K. Dobbin, Registrar, Presidency Small Cause Court, Calcutta, dated March 24, 1903.

(1) (1902) I. L. R. 29 Calc. 498.

The defendants not having entered appearance, the Registrar of the said Court recorded a decree for default under rule 60 of the rules framed by the High Court under s. 9 of the Presidency Small Cause Courts Act. Subsequently the defendants made an application to the Registrar, praying for a new trial, which was also dismissed for default. They then filed further grounds for a new trial, and the application was restored; but after several adjournments the Registrar rejected the said application with costs. Thereupon the defendants moved the High Court to set aside the orders of the Registrar rejecting their application for a new trial as illegal and passed without jurisdiction, and obtained this Rule.

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*Babu Hara Kumar Mitter*, in shewing cause, took a preliminary objection to the hearing of this Rule on the ground that a Division Bench of this Court had no power to set aside an order passed by the Calcutta Small Cause Court, unless rules had been framed under s. 13 of the Charter Act. S. 14 of the Charter Act only empowers the Chief Justice to determine which Judge or Judges shall constitute a Division Court, but unless rules have been previously framed for the purpose of dealing with orders passed by the Presidency Small Cause Court, the Division Court has no power to hear such application, and consequently the Chief Justice could not constitute a Division Court for that purpose. S. 14 of the Charter Act must be read as limited by s. 13, otherwise the two sections would be inconsistent: see the case of *Queen v. Nyn Singh*(1). S. 36 of the Letters Patent of 1865 refers to s. 13 of the Charter Act, and also lays down the same rule. In the rules framed by the High Court under the Charter Act, Division Courts are constituted for hearing cases from provincial districts, but Calcutta is not included in them; and it was held in the case of *Shamsher Mundul v. Ganendra Narain Mitter*(2) that the Bench presiding over the Presidency Group has no jurisdiction over the Calcutta Small Cause Court.

*Babu Jogesh Chunder Dey* for the petitioners. Under s. 15 of the Letters Patent, as also under s. 622 of the Civil Procedure Code, the High Court has ample power to hear such applications against orders of the Registrar of the Calcutta Small Cause Court.

(1) (1870) 2 N.-W.-P. H. C. R. 117.

(2) (1902) 1. L. R. 29 Calc.498.

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This Bench may be taken as constituted under s. 14 of the Charter Act.

The question in this case is, whether the Registrar of the Calcutta Small Cause Court has power to set aside a decree by default in a suit for liquidated demands. I submit he has not: see rules 60, 61, and 63 of the rules framed by the High Court. The Registrar might have original jurisdiction, but after a decree the application must be made to the *Court* and not to the *Registrar*. Rules 76 to 82 make distinctions between the Court and the Registrar.

*Babu Hara Kumar Mitter* in reply. As the Registrar has power to pass an *ex-parte* decree, he has power to deal with an application for setting it aside. He is also invested with *quasi-judicial* powers in respect of liquidated demands exceeding Rs. 20. S. 36 of the Presidency Small Cause Courts Act extends to such a case like this. In Rule 63 also the Courts includes the Registrar as regards setting aside *ex-parte* decrees, and the word "Court" is not always confined to a "Judge." If, however, the Registrar be not a Court, the petitioners have no *locus standi*, as they can only apply to the High Court to set aside an order of the "Court." If the order of the Registrar be not taken as an order of the Court, but that of an officer of the Court, the High Court cannot interfere with it in revision; the petitioner may have his remedy by a regular suit.

**MACLEAY C. J.** We are invited by the present petitioners, who are defendants in a Small Cause Court suit for the recovery of a certain sum of money,—a liquidated claim,—to interfere under section 622 of the Code of Civil Procedure, and to hold that certain orders made by the Registrar in the suit were made by him without jurisdiction.

The facts as to which there is no dispute are these: On the 3rd of February 1902, the plaintiff brought an action in the Court of Small Causes of Calcutta for the recovery of a sum of Rs. 450, alleged to be due for money advanced. The defendants, who alleged that no notice of the proceedings were served upon them, entered no appearance, and on the 27th of February 1902 the Registrar made a decree for default with costs.



The present petitioners, as they say—and this apparently is not contradicted—acquired knowledge for the first time of this *ex-parte* decree some time in the month of May following, and they then made an application on the 21st of June, asking for a new trial. That came on, on the 7th of July, and apparently the petitioners, who were present in the Court-room, did not hear the application called on, and it was accordingly dismissed by the Registrar. On the same day they filed further grounds for a new trial, and on the 21st of July the application for a new trial was restored, and after several adjournments, the Registrar, on the 17th of February 1903, rejected the application with costs.

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The petitioners, though from their action they would seem to have thought that the Registrar had jurisdiction to deal with these applications, now contend that the orders of the 7th of July 1902 and of the 17th of February 1903 were passed without any jurisdiction on his part. Hence the present application under section 622 of the Code of Civil Procedure

A preliminary objection has been taken that the Bench as now constituted has no jurisdiction to deal with this application.

I am unable to accede to that view. It is clear, having regard to section 6 of the Presidency Small Cause Courts Act (XV of 1882), that the Presidency Small Cause Court is deemed to be under the superintendence of, and subordinate to, the High Court, and there cannot, I think, be any reasonable doubt that this Court has jurisdiction to review, under section 622 of the Code, orders which are said to have been made without jurisdiction in the Presidency Small Cause Court. This has been done again and again without objection. But it is contended by the opposite party that, inasmuch as no rules have been made under section 13 of the Charter Act, assigning to any Judges or to any Division Bench such a case as the present, this Bench has no jurisdiction to deal with it, and that it can only be heard by the Chief Justice and all the Judges of the High Court sitting together. This contention at the present day is rather startling. We are referred to the case of *Shamsher Mundul v. Ganendra Narain Mitter*(1), where it was held that the Bench taking cases of the Presidency Group has no jurisdiction

(1) (1902) I. L. R. 29 Calc. 498.

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over the Court of Small Causes at Calcutta, and it has no power to set aside the decree of the same Court. It is worthy of notice that in that case the Judges said that they had not been asked to exercise their extraordinary jurisdiction under section 15 of the Charter. It may well be that the decision in that case is not open to question, but it does not affect the present case. The application here is made not to the Bench taking the cases of the Presidency Group as such, but to the Chief Justice, who has power under section 14 of the Charter Act to determine what Judges in each case shall sit alone and what Judges shall constitute the various Division Benches, and to say what Judge or Judges shall hear a particular case. It is by reason of this power, so vested in the Chief Justice, that applications of this nature, that is, in connection with orders made by the Presidency Small Cause Court, have invariably been made to the Chief Justice, who can appoint, and who does then and there appoint himself and the Judge who may be sitting with him, to be the Bench to hear the application. It has been the universal practice, I believe, ever since the High Court was established, for the Chief Justice to say what particular case shall be tried by any particular Judge or Judges, and, until this moment, that position has never been challenged. In this present case I, as Chief Justice, have constituted this Bench, consisting of the learned Judge who is sitting with me and myself, to hear this application, and I do not think there is anything which prevents me from doing that.

The preliminary objection must be overruled.

On the merits, I have no doubt that the Registrar had no jurisdiction to entertain the application in question after the *ex-parte* decree had been made by him. The Court, as opposed to the Registrar, was under the rules the proper and the only authority which could deal with an application to set aside the *ex-parte* decree. It is clear, looking at rules 63, 70, 92 and 94 that the Registrar had no jurisdiction to deal with the application to set it aside under rule 63. The Court and the Court alone as opposed to the Registrar, who is invested with only a limited judicial power, can deal with such applications. A marked distinction is drawn in the rules between the power of

the Court and the power of the Registrar. Section 36 does not help the opposite party: that section applies to decrees and orders made by the Registrar under section 14, which is the only previous section which gives him jurisdiction to act judicially.

On these grounds the Rule must be made absolute as to the order of the Registrar of the 7th July 1902 and the 17th February 1903 with costs.

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**MITRA J.** I concur.

S. C. G.

*Rule absolute.*

## CRIMINAL REVISION.

A. M. DUNNE

v.

KUMAR CHANDRA KISORE.\*

1902  
Dec. 15.

*Receiver—Party—Jurisdiction—Proceedings under s. 145 of the Code of Criminal Procedure (Act V of 1898)—Possession of Receiver.*

A Receiver appointed by the High Court cannot be made a party to a proceeding under s. 145 of the Code of Criminal Procedure merely in his capacity of Receiver, and a Magistrate has no jurisdiction to interfere with him in respect of his possession of the estate, without the sanction of the Court,—his possession being the possession of the Court.

*Ex-parte* *Cochrane*(1), *William Russell v. The East Anglian Railway Company*(2), and *Ames v. The Trustees of the Birkenhead Docks*(3) referred to.

*Semble.* The Receiver can neither sue nor be sued without the leave of the Court. *Müller v. Ram Ranjan Chakravarti*(4) referred to.

RULE granted to the petitioner, A. M. Dunne.

This was a Rule calling upon the District Magistrate of Rangpur and the opposite party to show cause why an order made

\* Criminal Revision No. 877 of 1902 against the order of Rakhal Das Chatterjee, Subdivisional Officer of Gaibandha, dated July 8, 1902.

(1) (1875) L. R. 20 Eq. 282.

(3) (1855) 20 Beav. 332.

(2) (1850) 3 Mac. & G. 104.

(4) (1884) I. L. R. 10 Cal. 1014.

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by the Subdivisional Magistrate of Gaibandha dated the 8th July 1902, under s. 145 of the Code of Criminal Procedure, should not be set aside as made without jurisdiction on the grounds (i) that there was no jurisdiction to make such an order against the Receiver; (ii) that the police report was insufficient; (iii) that the first and second party were in joint possession of the *hât*

In this case there was a dispute between the Burdhan and Tagore zemindars relating to the collection of tolls at a *hât* which was said to be situated on the boundaries of the Burdhan and Tagore estates. The Burdhan zemindar contended that each party was entitled to take the tolls in so much of the *hât* as lay in his zemindari. The Tagore zemindars, on the other hand, contended that each party was entitled to take half the tolls of the entire *hât*.

The police having reported that a likelihood of a breach of the peace existed owing to such dispute, proceedings under s. 145 of the Code of Criminal Procedure were taken by the Subdivisional Magistrate of Gaibandha, and Mr. Dunne, who had been appointed Receiver of the Tagore estates by the High Court, and who raised no objection, was made the first party and the zemindars of the Burdhan estate, Kumar Chandra Kisore and others, the second party.

On the 8th July 1902 the Subdivisional Magistrate made an order declaring the second party to be in possession, and forbidding the first party to disturb such possession.

The Advocate-General (Mr. J. T. Woodroffe), (Babu Mohini Mohan Chakravarti and Babu Hara Prosad Chatterjee with him), for Kumar Chandra Kisore and others, showed cause. No doubt, that when the Court has appointed a Receiver and the Receiver is in possession, his possession is the possession of the Court, and it may not be disturbed without the leave of the Court; and a person who disturbs or interferes with the possession of a Receiver is guilty of contempt, and is liable to be committed (Kerr on Receivers, pp. 158 and 171). But that relates to interference by private persons, and does not apply to this case. Here the party interfering with the Receiver is the Magistrate, and this Court cannot be expected to send him to prison for contempt of Court. There is nothing in the law excluding the Receiver from the operation of

s. 145; and to hold that he is so excepted will be to read into the Statute an exception which it does not contain. The Courts will not protect a sheriff because under the writ of *ſeri facias* he becomes the agent of the party.

Section 145 of the Code of Criminal Procedure deals with possession, and where the Court has put a Receiver into possession it can hardly be said that the Court is the person taking part in the dispute. No objection was taken in the lower Court by the Receiver to his being made a party to the proceedings; if it had been, the Magistrate would have applied for leave to deal with the matter: see s. 537 of the Criminal Procedure Code. It must also be shown that the Receiver was put in possession of the land.

Mr. Jackson (Mr. Caspersz, Babu Nilmadhub Bose and Babu Mukund Nath Roy with him) for the petitioner. The police report is insufficient; it only contains a general statement that there is a possibility of a breach of the peace: there are no details regarding the dispute. The first and second party are in joint possession of the *hatt*, so no proceedings under s. 145 could be taken. The possession of the Receiver is the possession of the Court, and no one can disturb it without the leave of the Court: see *Aston v. Heron*(1). The Court below knew my client was a Receiver appointed by the High Court, and he was made a party as such Receiver. S. 537 of the Code does not apply to this case. Consent cannot give jurisdiction, nor can the fact that I raised no objection before the Magistrate give him jurisdiction.

A Court will not permit its Receiver to be interfered with or dispossessed of property without an application being first made to it for leave: see *Ames v. The Trustees of the Birkenhead Docks* (2), *William Russell v. The East Anglian Railway Company*(3). It is well established that a Receiver cannot be sued without the leave of the Court appointing him, yet here he has been made a party to a *quasi-civil* proceeding under s. 145, and divested of the possession of all the land of which the Court had put him in possession; and he has no remedy. If the Receiver be appointed after the order of the Magistrate under s. 145 is made, that would not affect the question of jurisdiction: see

(1) (1834) 2 Myl. & K. 390.

(2) (1855) 20 Beav. 332.

(3) (1850) 3 Mac. & G. 104.

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*Sri Mohan Thakur v. Narsing Mohan Thakur*(1), but here the Receiver was appointed before these proceedings were instituted. The Receiver cannot be said to be a party concerned in the dispute. The Court will not allow attachment, as it is an interference with the Receiver's possession: *Jogendra Nath Gossain v. Debendra Nath Gossain*(2).

The Court will not tolerate interference with a Receiver either civilly or criminally. If a Receiver does a criminal act, he cannot be indicted *qua* Receiver, but as a man: see *Miller v. Ram Ranjan Chakravarti*(3).

**HARRINGTON AND BRETT JJ.** In this case a Rule was obtained calling on the District Magistrate and opposite party to show cause why an order made under section 145 of the Code of Criminal Procedure should not be set aside as made without jurisdiction. The dispute which gave rise to these proceedings relates to the collection of tolls at a *hāt* which is alleged to be situated on the boundaries of the Burdhan and Tagore estates, the contention of the Burdhan zemindar being that each party is entitled to take the tolls in so much of the market as lay in his own zemindari, and the contention of the Tagore zemindar being that each party is entitled to take half the tolls of the entire market. There being a likelihood of a breach of the peace, proceedings under section 145 were taken, the Receiver of the Tagore estate and others being made first party and the zemindar of the Burdhan estate and others being the second party, and an order was made declaring the second party to be in possession and ordering the first party not to disturb such possession.

In support of the Rule to set aside the order, three objections were taken:—

- (a) There is no jurisdiction to make such an order against the Receiver.
- (b) The police report is insufficient: and
- (c) The first and second party are in joint possession of the *hāt*, and so proceedings cannot be had under section 145.

(1) (1899) I. L. R. 27 Calc. 259.

(2) (1898) I. L. R. 26 Calc. 127.

(3) (1884) I. L. R. 10 Calc. 1014.

The second and third points can be briefly disposed of.

As to the police report, it is true that the expression used in it by the reporting officer is "there is a possibility of the breach of the peace." It is argued that this is insufficient, but when the whole report is read, it is found that the Inspector gives a very explicit account of the quarrel, and states facts which show that there was a likelihood of a breach of the peace.

This objection, therefore, to the order fails.

We do not think there is any foundation for the third point, *viz.*, that the parties were in joint possession. One party was alleging an exclusive right to collect the entire toll from one partitioned half of the market, the other party denied this right; under these circumstances we see no ground for saying that proceedings under section 145 could not be had.

The remaining point which was taken, *viz.*, that the Receiver of the High Court could not be made a party to these proceedings simply in his capacity of Receiver, is more important and more substantial.

In support of the Rule it is argued that the Receiver is made a party not because he has, as an individual, interested himself in a dispute likely to cause a breach of the peace, but merely in his capacity of Receiver, that the possession of the Receiver is the possession of the Court whose officer he is, and that the Court will not tolerate an interference with its officer.

The Advocate-General in showing cause against the Rule replied that the objection that the proceedings could not be taken against the Receiver was not taken before the Magistrate, and that to hold that the Receiver is excepted from the operation of section 145 will be to read into the Statute an exception which it does not contain. The latter of these two arguments we do not think well founded. The Crown, for example, is not expressly excepted, but it could hardly be said that the Crown was liable to be made a party.

The former argument has more weight. We agree that the Receiver ought to have objected that he was not a party concerned in the dispute and to have refused to take any step from which it could be said he had submitted himself to the jurisdiction of the Magistrate, but we do not think his failure to take that course

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precludes the Court from setting aside the order against him, if we should be of opinion that such order could not be made.

When a Receiver is appointed by the Court, his possession is the possession of the Court, and he cannot be interfered with except with the leave of the Court: see *Ex-parte Cochrane*(1).

The Receiver can neither sue nor be sued without the leave of the Court: see *Miller v. Ram Ranjan Chackravarti*(2). He is the officer through whom the Court exercises its powers of management. In our opinion such an officer cannot be correctly described as a "party interested in a dispute likely to cause a breach of the peace."

But even if the officer of the Court could be so described, we think there would be no jurisdiction in the Magistrate to make any order on him under section 145 without the sanction of the Court. The order directs that the Receiver shall not disturb the possession of the second party; in other words, the Magistrate is assuming a jurisdiction to interfere with the officer of this Court, as such, without the sanction of this Court, and it is well, settled law that the Court will not, without its leave, permit its officer to be interfered with: see *William Russell v. The East Anglian Railway Company*(3) and *Ames v. The Trustees of the Birkenhead Docks*(4).

For these reasons the order under section 145 must be set aside.

The Rule is made absolute.

D. S.

Rule absolute.

(1) (1875) L. R. 20 Eq. 282.

(2) 1884) I. L. R. 10 Calc. 1014.

(3) (1850) 3 Mac. & G. 104.

(4) (1855) 20 Beav. 332.

FULL BENCH.

DEBENDRA NARAIN ROY

v.

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1908

Feb. 13, 1908.
March 30.

Mortgage—Suit by puisne mortgagees—Right of sale by puisne mortgagees—Decree on first mortgage to which puisne mortgagees was not a party—Transfer of Property Act (IV. of 1882) s. 85—Civil Procedure Code (Act XIV of 1882) s. 287—Indian Registration Act (III of 1877) s. 17.

A puisne mortgagee is entitled to a sale of the property secured by his mortgage, subject to the rights of the first mortgagee, even after the property has been sold in execution of a decree obtained by the first mortgagee in a suit to which the puisne mortgagee was not a party.

Durga Churn Mukhopadhyaya v. Chandra Nath Gupta Chowdry (1) overruled.

REFERENCE to a Full Bench in Second Appeal by the defendants, Debendra Narain Roy and others.

The suit was instituted by the plaintiffs, Ramtaran Banerjee and others, for the recovery of Rs. 779-15 on a mortgage bond executed by the defendant No. 1, dated the 7th September 1887, hypothecating the mortgagor's interest in properties A and B described in the schedule to the plaint. The plaintiffs alleged that they were informed on inquiry that property A had been purchased by one Narendra Narain Roy Chowdhry, deceased, the father of the defendants Nos. 2 to 6, and by the defendant No. 7 at an auction sale, in execution of a decree under a prior mortgage, comprising the interests of the defendant No. 1 and his brother, one Nurul Hossein, the mortgagors, in respect of the said mortgage, and that the defendants Nos. 8 to 10 had taken a settlement of the said property from the said auction-purchasers. The plaintiffs prayed (i) that a decree be made for the amount claimed, (ii) that an order be passed for the sale of the mortgaged properties A and B, (iii) that if the prior mortgage be found to

* Reference to Full Bench in Appeal from Appellate Decree No. 2245 of 1899.

Full Bench: Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Prinsep, Mr. Justice Sale, Mr. Justice Stevens and Mr. Justice Geidt.

(1) (1899) 4 C. W. N. 541.

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be true, the property A may be sold free from the prior mortgage lien of the purchasers in respect of the half share of the defendant No. 1, or that an order be passed for the sale of the said property A, subject to the said prior mortgage lien, and for other reliefs.

The plaintiffs also alleged that as they had not been made parties to the decree obtained under the said prior mortgage, they were not bound thereby.

It appeared that the prior mortgage mentioned in the plaint was executed on the 12th August 1881 by the defendant No. 1 in favour of one Ganga Narain Sen, whereby the share of the defendant No. 1 in property A was hypothecated, and that subsequently to the plaintiff's mortgage, Deboki Nandan Sen and others, the heirs of the said Ganga Narain Sen, brought a suit on their mortgage and obtained a decree. In execution of that decree, the interest of the defendant No. 1 in property A was sold in 1888, and purchased by the father of the defendants Nos. 2 to 6 and the defendant No. 7. It does not appear, however, that Deboki Nandan and his brothers were aware of the plaintiffs' mortgage when they brought their suit, or that the auction-purchasers were aware of it at the time of their purchase.

The Court of First Instance at first dismissed the plaintiffs' suit on the following amongst other grounds: (i) that it having transpired in the course of the trial that the property A had been mortgaged by the defendant No. 1 and his brother to several persons before the mortgage of 1881, which mortgage debts were alleged by the defendants Nos. 2 to 6 to have been all paid off by their father, as well as after the mortgage of 1881, some of which subsequent mortgage debts had not yet been paid off, the suit was defective on account of the non-joinder of these several mortgagees as parties, and (ii) as the plaintiffs, as puisne mortgagees, had only the right of redemption against the defendants, their prayer for the sale of the property A must fail.

On appeal the Subordinate Judge held that the defect of parties, if any, should be cured by adding all mortgagees prior and subsequent to the mortgage of 1881 as parties to the suit, and upon other grounds also, not necessary to specify here, remanded the case to the first Court for trial on the merits. On remand the Munsif passed the usual mortgage decree, declaring,

however, that if the plaintiffs wanted to sell the mortgaged property A, it could only be sold subject to the prior mortgage; or, in other words, that the plaintiffs could sell only the equity of redemption of the defendant No. 1 in that property.

The Subordinate Judge affirmed this judgment of the first Court on appeal, holding that the order for the sale of the property A, subject to the prior mortgage of 1881, was a proper order.

The defendants Nos. 1, 6, 7, 8 and 9 appealed to the High Court. The appeal came on for hearing before a Division Bench (MACLEAN C.J. and STEVENS J.) on the 15th August 1902.

Their Lordships entertaining a doubt as to the soundness of the decision in the case of *Durga Churn Mukhopadhyaya v. Chandra Nath Gupta Chowdry*(1), referred the case to a Full Bench, with the following opinions:—

MACLEAN C.J. As we entertain a serious doubt as to the soundness of the decision in the case of *Durga Churn Mukhopadhyaya v. Chandra Nath Gupta Chowdry*(1) and, as the point is one of considerable importance, we think the matter must go to a Full Bench. My present view is that the present plaintiff is entitled, as against the present defendants, in whom are now vested the interests of the first mortgagee and of the mortgagor, to a sale of the property mortgaged to him, as second mortgagee, subject, of course, to the rights of the prior mortgagee. That originally would have been one of his rights, as is conceded in the case I have cited, and I do not see how that right can be affected or taken away from him by reason of the suit which the first mortgagee brought to enforce his security, not making the second mortgagee, the present plaintiff, a party. If the decision in the case of *Durga Churn Mukhopadhyaya v. Chandra Nath Gupta Chowdry*(1) be sound, he is deprived of this original right. It seems to me we ought to look, not at what his rights would have been, had he been made a party to the first mortgagee's suit, but what his rights as second mortgagee are as he was not made a party. I take it that it would have been open to him, if there had been nothing else in the case, to have

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brought a suit, as second mortgagee, against his mortgagor, who is the only person with whom he contracted to realize his security, subject, of course, to the superior rights of the first mortgagee. The cases of *Narayanasami Naidu v. Narayana Rau*(1) and of *Rangayya Chettiar v. Parthasarathi Naickar*(2) lend colour to this view, and I do not think that these decisions are displaced by the later decision in the case of *Muhammad Usan Rowthan v. Abdulla*(3). In this view I think the decision of the Court below is right.

With these observations, as the matter is of importance, and we entertain considerable doubt as to the soundness of the decision in the case of *Durga Churn Mukhopadhyaya v. Chandra Nath Gupta Chowdry*(4), we refer the case to a Full Bench:

The question referred is whether the plaintiff is entitled to a sale of the property secured by his mortgagee, subject to the rights of the first mortgagee, or whether he is only entitled to redeem the first mortgage.

STEVENS J. I concur.

On this reference:—

Babu Karuna Sindhu Mukerjee, for the appellants. I submit (i) that if the first mortgagee brings a suit on his mortgage and sells the mortgaged property without making the second mortgagee a party, a third party auction-purchaser acquires the equity of redemption with the lien of the first mortgage; (ii) that if so, all the right that the second mortgagee has, is to redeem; and (iii) that it is only when the first mortgagee has not already sold the property that the second mortgagee can bring it to sale, subject to the first mortgage.

As to what passed at the sale by the first mortgagee, I refer to *Mehan Manor v. Togu Uka*(5), *Gajadhar v. Mulchand*(6), *Dadoba Arjunji v. Damodar Raghunath*(7), *Bunwari Jha v. Ramjee Thakur*(8), and *Emam Momtazuddeen Mahomed v. Raj Coomar Dass*(9).

(1) (1893) I. L. R. 17 Mad. 62.

(2) (1896) I. L. R. 20 Mad. 120.

(3) (1900) I. L. R. 24 Mad. 171.

(4) (1899) 4 C. W. N. 541.

(5) (1885) I. L. R. 10 Bom. 224.

(6) (1888) I. L. R. 10 All. 520.

(7) (1891) I. L. R. 16 Bom. 486, 491.

(8) (1902) 7 C. W. N. 11.

(9) (1875) 14 B. L. R. 408; 23 W. R. 187, 190.

If the second mortgagee sues first, he can sell.

[MACLEAN C. J. If so, is he deprived of that right by a suit to which he was not a party ?]

I refer to *Kanti Ram v. Kutubuddin Mahomed*(1). After sale by the first mortgagee, the second mortgagee has nothing to sell. His lien only remains. He cannot sell his own lien. He can redeem and then sue for his money and apply for sale.

[SALE J. I can't understand why he should not be able to sell, if he can redeem.]

I refer to *Muhammad Usan Rowthan v. Abdulla*(2) and *Matadin Kasodhan v. Kazim Husain*(3). The question is whether possession of the auction-purchaser can be disturbed at the instance of the second mortgagee: see *Desai Lallubhai Jethabhai v. Mundas Kuberdas*(4). The second mortgagee can ask for surplus sale-proceeds. [MACLEAN C. J. The second mortgagee has also a right to call upon the mortgagor to redeem him.] I refer to *Dorasami v. Venkataseshayyar*(5).

The cases of *Rangayya Chettiar v. Parthasarathi Naickar*(6) and *Narayanasami Naidu v. Narayana Rau*(7) have been considered and explained in *Muhammad Usan Rowthan v. Abdulla*(2).

There is a distinct finding that my client was a *bonâ fide* purchaser; and that is sufficient. The proceedings were all good. The auction-purchaser paid off prior mortgages.

[SALE J. If your contention that the auction-purchaser acquired an absolute property be correct, why should the second mortgagee have any right at all, even a right to redeem ?]

[MACLEAN C.J. What do you say to the case of *Umes Chunder Sircar v. Zahur Fatima*(8) ? In none of the cases has it been held that to redeem was the only remedy.]

Yes. But in the Privy Council case, this question was not before their Lordships. The second mortgagee must first bring a suit for redemption. I represent the first mortgagee. The suit against me must be under s. 92 of the Transfer of Property Act

(1) (1894) I. L. R. 23 Calc. 33.

(2) (1900) I. L. R. 24 Mad. 171.

(3) (1891) I. L. R. 18 All. 432, 464.

(4) (1895) I. L. R. 20 Bom. 390.

(5) (1901) I. L. R. 25 Mad. 108, 114.

(6) (1896) I. L. R. 20 Mad. 120.

(7) (1893) I. L. R. 17 Mad. 62.

(8) (1890) I. L. R. 18 Calc. 164; L. R. 17 I. A. 201.

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to redeem and then to sell: see also *Dhapi v. Barham Deo Pershad*(1).

Moulvie Serajul Islam, for the appellant-defendants Nos. 8 to 10, contended that they being third parties, their settlement remained unaffected.

Babu Lalmoohan Das (Babu Nalini Ranjan Chatterjee with him) for the respondents. The second mortgagee has two rights, namely, (a) to sell the property to realise the money, and (b) a right to redeem. What has he done to forfeit either right? The rights of the first mortgagee remain unaffected by sale by the second mortgagee. Besides, s. 85 of the Transfer of Property Act is a part of adjective law and cannot affect the rights of parties. The cases of *Gobind Lal Roy v. Ramjanam Misser*(2) and *Unes Chunder Sircar v. Zahur Fatima*(3) are conclusive with regard to the point now under reference. The case of *Vencatachella Kandian v. Panjanadien*(4) was relied upon by the Lower Court. I also rely upon *Narayanasami Naidu v. Narayana Rau*(5). Reference was also made to *Moti Lal v. Karrabuldin*(6).

Babu Karuna Sindhu Mukerjee, in reply. The purchaser of the equity of redemption is entitled to retain possession till the money paid by him is repaid: see *Gokaldas Gopaldas v. Puranmal Premeukhdas*(7). The case of *Vencatachella Kandian v. Panjanadien*(4) was distinguishable, as there was no judicial sale in that case. If this reference was decided against the appellants, there would be no confidence in judicial sales in this country.

Cur. adv. vult.

March 30.

MACLEAN C.J. In my opinion we ought to answer the question submitted to us by saying that the plaintiff is entitled to a sale of the property secured by his mortgage, subject to the rights of the first mortgagee, and I propose to add very little to what I have already said when referring the case.

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| (1) (1899) 4 C. W. N. 297, 302. | (4) (1881) I. L. R. 4 Mad. 213. |
| (2) (1893) I. L. R. 21 Calc. 70; | (5) (1893) I. L. R. 17 Mad. 62. |
| L. R. 20 I. A. 165. | (6) (1897) I. L. R. 25 Calc. 179; |
| (3) (1890) I. L. R. 18 Calc. 164; | L. R. 24 I. A. 170. |
| L. R. 17 I. A. 201. | |
| (7) (1884) I. L. R. 10 Calc. 1085; L. R. 11 I. A. 126. | |

The second mortgagee was not a party to the suit instituted by the first mortgagee against the mortgagor, and he was in no way bound by those proceedings: see the case of *Unes Chunder Sircar v. Zahur Fatima*(1). It would appear that the Judges of this Court who decided that case were of opinion that in such a case the puisne mortgagee was entitled to redeem or to have the property sold (see page 172), and the Privy Council supported that view (see page 179). If, as was laid down in *Gobind Lal Roy v. Ramjanan Misser*(2), a purchaser at a sale in execution of a decree obtained by a first mortgagee, in a suit to which the puisne incumbrancer was not a party, does not displace the latter but stands only in the position of the first mortgagee, there cannot be any doubt that the puisne incumbrancer could, as against the mortgagor, sell, subject to the first mortgage. I should have thought for my own part that, under such a sale, the interest of the first mortgagee and of the mortgagor passed to the purchaser, subject to the rights of the puisne incumbrancer. But taking this to be so, it would not assist the present appellant. If there had been no suit by the first mortgagee, the puisne incumbrancer could have sued the mortgagor, and, subject to the mortgagor's right to redeem, have obtained a decree for the sale of the equity of redemption, that is, of the property subject to the first mortgage. See *Kanti Ram v. Kutubuddin Mahomed*(3). This right cannot be taken away by any decree made in a suit to which he was not a party, and by which he was not bound.

For these reasons I would answer the question as I have stated above.

The appeal is dismissed with costs, including the costs of this reference.

PRINSEP J. In this case the first mortgagee, in execution of a decree obtained under the Transfer of Property Act, sold the mortgaged property and it was purchased by a third party.

The plaintiffs who held a second mortgage were not made parties to that suit, and they now claim to enforce their right as second mortgagees, subject to the previous mortgage. In the

(1) (1890) I. L. R. 18 Calc. 164; L. R. 17 I. A. 201.

(2) (1893) I. L. R. 21 Calc. 70; L. R. 20 I. A. 165.

(3) (1894) I. L. R. 22 Calc. 33.

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case of *Umes Chunder Sircar v. Zahur Fatima*(1) their Lordships of the Privy Council have held that proceedings in a suit brought by a first mortgagee to which a puisne incumbrancer was no party are not binding on him so as to affect his right under the second mortgage. There can be do doubt, therefore, that the second mortgagee is entitled either to sell the mortgaged property, subject to the decree obtained by the first mortgagee, the terms of which are not disputed, or to redeem the first mortgage and then proceed against the entire mortgaged property. In this case the rights of the first mortgagee have passed to the auction-purchaser, who has also bought the equity of redemption so as to represent also the mortgagor, subject to any puisne incumbrance. The difficulty that I have felt in dealing with this case arises from the terms of section 85 of the Transfer of Property Act, which required a first mortgagee to make parties to his suit all persons having any interest in the mortgaged property, such as a puisne incumbrancer, *provided that he (the plaintiff) has notice of such interest*. I find it impossible satisfactorily to explain the meaning of this proviso, except to say that section 85 declares that with notice of an interest in the property a suit cannot be brought without making a party having such interest, a party to the suit. But it leaves it open what the result is, if without notice, as in this case, a suit is brought without making such person a party.

In this case both the mortgages were by registered instruments. It has not been found that the first mortgagee had notice of the second mortgage, so that the suit brought by him is not open to any objection as to its form in regard to section 85.

Under rules made by this High Court for the preparation of a proclamation of sale in execution of a decree, careful enquiry has been directed to be made in the terms of section 287 of the Code of Civil Procedure to ascertain and state in that proclamation everything which the Court considers material for the purchaser to know in order to judge of the nature and value of the property. In a proclamation of sale in execution of a mortgage decree, it is most material that it should be known whether there is any incumbrance, prior or puisne to the mortgage, on account of which be the property is to be

(1) (1890) I. L. R. 18 Calc. 164; L. R. 17 I. A. 201.



advertised for sale, and enquiry should be directed to ascertain this. For the purposes of such enquiry it is declared that the "Court may summon any person whom it thinks necessary and examine him in respect of any such matters." In drawing attention to these provisions of the law, I desire to impress upon the Lower Courts that it is their duty, before proceeding to sell in execution of a mortgage decree, to endeavour to ascertain whether the mortgaged property is subject to any other incumbrance, and for this purpose they should ordinarily examine both the mortgagee and the mortgagor. It is by such means only that the Court can make known to the purchaser what is material that he should know in order to judge of the nature and value of the property under sale. Without this information the purchaser may be induced to pay much more than the property is worth. He may be liable to a previous mortgage or mortgages unknown to him, or, as in the present case, there may be a puisne mortgage which must materially diminish the value of the right to redeem which he has been induced to purchase. And unless it is known that some inquiry has been held, persons will not purchase at sale in execution of a mortgage decree, or if they do bid, they will not bid beyond the amount of the decree under execution. Even that will involve considerable risk, for the decree under execution may be for a puisne mortgage and the property sold may thus be subject to prior mortgage. It is this uncertainty that prevents persons being concerned in mortgage transactions outside the Presidency towns. I should be glad to see some attempt made by the Legislature to make title, obtained by purchasers at such judicial sales and expressly at sales in execution of mortgage decrees, more certain, or, at all events, less liable to such risks.

I may mention that the High Courts of Bombay and Allahabad have held that registration of a mortgage deed amounts to notice of a mortgage. This High Court has refused so to interpret the law. I regard this as unfortunate, because it tends to complicate all mortgage transactions. The law requires the registration of all mortgages of immoveable property "of the value of one hundred rupees or upwards" (Indian Registration Act, III of 1877, section 17), and it seems to me that by refusing

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to recognize registration of a mortgage as notice thereof, the full benefits of registration are lost. A purchaser at a judicial sale in execution of a mortgage decree is not protected as he should be. But however that may be, I desire to impress upon the Courts that it is their duty as much as possible to inform persons, desiring to purchase in execution of decrees passed by them, of what it is material that they should know, in order to judge of the nature and value of the property under sale, by taking such steps as I have indicated in the preparation of the sale proclamation.

In answer to the question put to this Full Bench I would reply that, notwithstanding the sale under the previous mortgage in proceedings to which the plaintiff as second mortgagee was no party, he has still the right to redeem that mortgage, and he has also the right to sell the property, subject to the decree under the previous mortgage. He can thus sell the property outright, in which case the amount due under the decree on the first mortgage will be first satisfied out of the sale-proceeds, or he can, if so advised, sell only the right to redeem that mortgage, that is to say, the right still remaining in him.

**SALL J.** I agree that the reference should be answered in the manner proposed by the learned Chief Justice. If it be conceded, as it has been in this case, that the plaintiffs' right to redeem remains unaffected, it follows in my opinion that the plaintiffs must also have the right to have the mortgaged property sold, subject to the obligation or charge in respect of which the right to redeem exists.

**STEVENS J.** I agree in the answer which the learned Chief Justice proposes to give to the question that has been referred to us. It seems to me that any other answer would involve the proposition that the second mortgagee may be prejudicially affected by proceedings to which he was not a party, and by which, therefore, on general principles, he was not in any way bound.

**GRANT J.** I agree with my Lord the Chief Justice.

M. N. R.

*Appeal dismissed.*

## ORIGINAL CIVIL.

SURENDRA KESHUB ROY

v.

KHETTER KRISHTO MITTER.\*

1903

March 31.

*Practice—Revival of suit—Substitution of parties—Code of Civil Procedure (Act XIV of 1882) ss. 368, 372—"Pending suit"—Right to apply, accrual of—Limitation Act (XV of 1877) Sch. II, Art. 178.*

On directions to take an account in a suit, the suit is still "pending" within the meaning of s. 372 of the Code of Civil Procedure until the final order on the taking of the account is made; and the right to apply in such a suit to have the death of a certain defendant recorded, and the names of his heirs substituted on the record, accrues from day to day and is not barred under Art. 178, Sch. II of the Limitation Act. The provisions of s. 368 of the Code have no application to a case like this.

*Gocool Chunder Gossames v. The Administrator-General of Bengal*(1), *Kedarnath Dutt v. Harra Chand Dutt*(2), and *Ram Nath Bhattacharjee v. Uma Charan Sircar*(3) relied upon.

## APPLICATION.

This was an application in chambers made on the petition of one of the defendants, Norendro Keshub Roy, to have the death of Brojendra Nath Mitter, another defendant who had died, recorded and to have the suit revived by having the names of the heirs and legal representatives of the said Brojendra Nath Mitter substituted as defendants in his place.

The petition stated that the suit had been originally instituted in this Court on the 21st of August 1884 for the construction of the last will and testament of one Rajah Bijoy Keshub Roy Bahadur, and had finally gone up on appeal to Her late Majesty's Privy Council; that pending such appeal to the Privy Council one of the then defendants in the suit, Ranee Doorga Sundary Dassi, a widow of the said testator, had died, and that the said appeal was revived by an order of the Privy Council by adding the defendant, Khetter Krishto Mitter, who had on the death of the said Ranee Doorga Sundary Dassees become the sole heir to the testator. That by a decree of the Privy Council dated

\* Application in Original Suit No. 402 of 1884.

(1) (1880) I. L. R. 5 Calc. 726.

(2) (1882) I. L. R. 8 Calc. 420.

(3) (1899) 3 C. W. N. 756.

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the 6th of February 1892, it was *inter alia* declared that Norendro Keshub Roy, the present petitioner, was entitled on attaining his majority to receive certain moneys during the life of the said Ranees Doorga Sundary Dassees, deceased, and that this Court should direct several specified accounts to be taken, and that any other question arising out of the relief thereby granted should be dealt with by this Court on further directions.

It was further stated in the petition that by an order of this Court dated the 18th of August 1892, the defendants Abinash Chander Mitter, Brojendra Nath Mitter, Nogendra Nath Mitter, and Kally Prosad Mitter, the then heirs and representatives of the said Ranees Doorga Sundary Dassees, deceased, had been added as defendants in this suit for further proceedings.

That Brojendra Nath Mitter died some three years ago, leaving him surviving his father, Bhabodayini-Charan Mitter, his heir and legal representative. That the said Bhabodayini-Charan had also since died, and that upon his death the defendants Abinash Chander Mitter, Nogendra Nath Mitter, and Kally Prosad Mitter, brothers of the said Brojendra Nath Mitter, deceased, became the heirs and legal representatives of the said defendant, Brojendra Nath Mitter, deceased.

Mr. N. Chatterjee for the petitioner. I apply under s. 372 of the Code of Civil Procedure for the substitution of the names of Abinash Chander Mitter, Nogendra Nath Mitter, and Kally Prosad Mitter as defendants in the place of Brojendra Nath Mitter, deceased. It is an application in a pending suit in which no final order has been made: see *Gocool Chunder Gossamee v. The Administrator-General of Bengal*(1). The right to bring the names on the record accrues from day to day, and is not governed by Art. 175 C, Sch. II of the Limitation Act: see *Kedarnath Dutt v. Harra Chand Dutt*(2); *Ram Nath Bhattacharjee v. Uma Charan Sircar*(3).

Babu Subodh Chunder Mitter (contra). The application comes under s. 368 of the Code of Civil Procedure and not s. 372, and is barred by limitation: see *Jamnadas Chhabildas v. Sorabji Kharshedji*(4).

(1) (1890) I. L. R. 5 Calc. 726.

(2) (1882) I. L. R. 8 Calc. 420.

(3) (1899) 3 C. W. N. 756.

(4) (1891) I. L. R. 16 Bom. 27.

STEPHEN J. In this case the petitioner prays that the death of a defendant may be recorded, and that the suit may be revived by placing the names of certain defendants in the place of the deceased defendant.

The suit is for the construction of a will, which, not to notice the earlier stages of the litigation, led to a decree of the Privy Council, dated 6th February 1892, by which it was declared that the petitioner was entitled to a moiety of certain property, and this Court was directed to order an account to be taken of the testator's property at the time of his death and of the accumulations of the income of his estate during the life of one of his widows.

The changes that have taken place in the parties to the suit are as follows. The widow being one of the parties to the suit died during the pendency of the appeal to the Privy Council. One of the present defendants was then brought in as sole heir to the testator, and four brothers were made defendants as heirs to the widow, some of whose moveable property was stated to have been retained by them after her death. Of these brothers, one Brojendro Nath Mitter died more than three years ago, leaving his father, Bhabodayini-Charan, his heir. The son was never added as a defendant and died some time in 1902. It is now sought to have the death of the deceased brother recorded and to have the remaining brothers brought in as his heirs. Under these circumstances I think it is plain that the petitioning defendant's right to have the substitution prayed for made must be treated as though he were asking for the substitution to the son instead of substitution to the father as the son's heir. If the right to have the substitution could have been barred, if the son were alive, it is difficult to see how it can be revived by his death. Treating the case from this point of view, the first question raised is, does either section 368 or section 372 of the Civil Procedure Code apply. It is plain that section 368 cannot apply, since the decree in this suit is the decree of the Privy Council, and the son did not therefore "die before decree" in the terms of that section. The case is therefore one of the "other cases" mentioned in section 372, and the final order on the taking of the accounts not having been made, there is a "pending suit" according to the judgment of Pontifex J. in

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The next point is whether this application is barred by Article 178 of the Limitation Act, 1877, that is, whether three years have elapsed since the right to apply accrued. As I have already said, I consider that the present application might have been made at the death of the son, which was admittedly more than three years ago, and the question argued before me is, did the right to apply accrue at that time within the meaning of the Act? Reliance has been placed on the decision of Wilson J. in *Kedarnath Dutt v. Harra Chand Dutt*(2), followed by Sale J. in *Ram Nath Bhattacharjee v. Uma Charan Sircar*(3), in which it was decided that a right to make a similar application, being one in a pending suit, the right to apply was a right which accrued from day to day, and therefore it was not barred by lapse of time.

In both these cases the application was made after a partition had been decreed and before it had been carried out, and it is suggested that for that reason they cannot be held to apply to the present case. This, no doubt, creates a difference between those cases and the present one; since a right to partition, if it accrues at all, accrues from day to day, and a right to account does not.

It is not, however, on this characteristic of the case before him that the judgment of Wilson J. is founded, but on the fact that a suit was pending—a characteristic common both to that case and this. It is further urged that if that principle is applied to this case, there can be no limitation to an application under section 372. I am not concerned to say that this is the proper construction to be put on Mr. Justice Wilson's language, but if it is, I do not think the argument is conclusive. I consider therefore that the present case is governed by the two cases I have quoted, and that the petitioner's right to make this application accrues from day to day, and is therefore not barred by limitation. The petition is therefore granted in terms of the prayer.

Attorney for the petitioner : *Jnanendra Nath Dutt*.

J. E. G.

(1) (1880) I. L. R. 5 Calc. 726.

(2) (1882) I. L. R. 8 Calc. 430.

(3) (1899) 3 C. W. N. 756.

APPELLATE CIVIL.

RAKHAL MONI DASSI

c.

ADWYTA PROSAD ROY.*

1903
March 6.

Compromise—Minor—Guardian of Minor—Proper course to set aside a compromise decree—Appeal—Adoption, suit to set aside—Guardians and Wards Act (VIII of 1890) ss. 47, 48—Civil Procedure Code (Act XIV of 1882), ss. 443, 622.

When a compromise, and a decree based upon it are sought to be set aside on the ground that the compromise was entered into by the guardian of a minor defendant without the leave of the Court having been granted after a judicial determination that it was for the minor's benefit:

Held, that the proper course to set aside such a decree would be by way of an application for review in the first Court or by a separate suit, but not by an appeal from the compromise decree.

Biraj Mohini Dasi v. Chinta Moni Dasi(1) followed.

Section 48 of the Guardians and Wards Act does not prevent a widow, who has been appointed by the District Judge, under that Act, guardian of a minor as her husband's adopted son, from maintaining a suit for a declaration that the minor was not the adopted son of her husband.

SECOND APPEAL by the plaintiff, Rakhal Moni Dassi.

The suit was brought by the plaintiff for a declaration that the minor defendant No. 1, Adwyta Prosad Roy, was not the adopted son of her deceased husband. The plaintiff alleged that she was a minor at the time of her husband's death, which took place in 1892, and that the defendant No. 2, Hari Prosad Roy, the father of the defendant No. 1 and her husband's uncle, was entrusted with the management of her affairs; that while he was so employed, he got a false vakalutnama filed in her name in the Court of the District Judge and took out on her behalf a certificate of guardianship of the said minor defendant, Adwyta Prosad, on

* Appeal from Appellate Decree No. 588 of 1900, against the decree of W. B. Brown, District Judge of Cuttack, dated Jan. 17, 1900, reversing the decree of Behari Lal Mullick, Subordinate Judge of that district, dated Aug. 22, 1899.

(1) (1901) 5 C. W. N. 877.

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the false allegation that her husband had adopted him as his son before his death; and that all this was done fraudulently and without her knowledge. In the suit the defendant No. 1 was represented by his guardian, the defendant No. 2, and in a joint written statement they denied the allegations in the plaint and maintained that the defendant No. 1 was validly adopted.

A petition of compromise dated the 21st August 1899 was, however, filed in Court by both the parties, praying that the adoption be cancelled; that a six-anna share of the properties, excepting the homestead lands and buildings, of the deceased husband of the plaintiff, be declared to belong to the defendant No. 1, and that the remaining ten-anna share of the properties, together with the homestead lands and buildings be declared to belong to the plaintiff and her husband's heirs. The Subordinate Judge made a decree in the terms of the petition of compromise.

The defendant No. 1, now represented by his next friend, one Gonesh Prosad Roy, a distant cousin, appealed from the said decree to the District Judge, who held that the plaintiff was not competent to bring this suit in its present form so long as she remained guardian of the person and property of the defendant No. 1, and that her proper course was to apply to the District Court to be relieved of her guardianship. He further held that the compromise was illegal, as well as the decree founded upon it, which travelled beyond the boundaries of the original suit, invalidated the order of guardianship passed by the District Judge, and prejudiced the rights of the plaintiff's reversioners. He held that an appeal lay to him and dismissed the suit.

Dr. Ashutosh Mukerjee and Babu Biraj Mohan Masumdar for the appellant.

Babu Jagat Chunder Banerjee for the respondents.

BANERJEE AND HENDERSON JJ. This appeal arises out of a suit brought by the plaintiff-appellant to obtain a declaration that the defendant No. 1, a minor, was not the adopted son of her husband, and for such other relief as the plaintiff may be deemed to be entitled to. The plaint contains an allegation that the plaintiff has learnt on enquiry that the defendant No. 2, the natural father of the minor defendant No. 1, fraudulently

and without knowledge of the plaintiff had obtained by an application which was filed under a false vakalutnamah, purporting to be executed by the plaintiff, a certificate appointing the plaintiff as guardian of the defendant No. 1, as her husband's adopted son. The defence was a denial of the allegations in the plaint. Then it appears that the parties came to terms, and a *sulenama* or compromise was effected, and with the leave of the first Court, as the order-sheet shows, the natural father of the minor was allowed to enter into the compromise, and a decree was made in accordance with the terms thereof. Against that decree an appeal was preferred on behalf of the minor, represented not by his natural father by whom he was represented in the first Court, but by a distant cousin; and upon that appeal the learned District Judge has set aside the compromise and dismissed the plaintiff's suit upon the ground, as far as we can gather from his judgment, that an appeal lay because the compromise was unlawful, and that it was incompetent to the plaintiff to maintain the suit so long as the order of the District Judge appointing her as guardian of the minor defendant remained in force.

From that decision this appeal has been preferred; and it is contended on behalf of the plaintiff-appellant that the learned District Judge was wrong in holding that an appeal lay, and, in dealing with the case upon that appeal, the compromise was wrongly set aside.

In our opinion the contention of the learned vakil for the appellant is well founded. If the defendant No. 1 is entitled to have this *sulenama* set aside, he may have other remedy by way of an application for review in the first Court or by a separate suit; but an appeal was certainly not the proper remedy, especially having regard to the facts of this case. If the ground upon which the *sulenama* is to be pronounced unlawful, is, that it was entered into without the leave of the Court having been granted after that Court had judicially determined that the compromise was for the minor's benefit, it was not by way of appeal that that point could be made out, but the proper method was to apply to the Court which granted the leave to determine the point. An Appellate Court can determine the appeal only upon the materials

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before it on the record. Then, as for the ground taken by the learned District Judge, that it was not competent to the plaintiff to maintain the suit so long as the order appointing her guardian of defendant No. 1 stood, we are of opinion that that is an erroneous ground. Section 48 of the Guardians and Wards Act of 1890 has been relied upon in support of the learned Judge's view. That section says that, except as provided by section 47 of that Act and by section 622 of the Code of Civil Procedure, an order made under that Act shall be final and shall not be liable to be contested by suit or otherwise. That no doubt is so. The appointment of the plaintiff as guardian as being the proper person to have the custody of the person and property, or both, of the minor is a thing which it was for the District Judge, acting under the provisions of the Guardians and Wards Act, to determine so long as certain preliminary conditions remain fulfilled. But a party who had been appointed guardian, even admitting that she was appointed guardian by her own consent, might say: 'I then believed that the minor, whose guardian I was appointed, was the lawfully adopted son of my late husband; now I have taken advice, and I am told that the adoption is invalid in law. I want to have that adoption set aside.' She could not ask the District Judge under the Guardians and Wards Act to enter into an adjudication as to the validity or invalidity of the adoption and to revoke the order appointing her as guardian. Her only course would be to bring a suit to set aside the adoption, care being taken of course that the minor was properly represented by some other person whose interest was not adverse to that of the minor. Such a case as this is clearly contemplated by the second paragraph of section 443 of the Code of Civil Procedure. That being so, the decision of the Lower Appellate Court was clearly based upon an erroneous ground. The view we take that an appeal was not the proper mode of having a *sulenama* such as has been entered into in this case set aside, is in accordance with that taken by this Court in the case of *Biraj Mohini Dasi v. Chinta Moni Dasi* (1).

The decree of the Lower Appellate Court must therefore be reversed, and it would be left open to the respondent, if he wishes

(1) (1901) 5 C. W. N. 877.

to have the compromise set aside, to proceed either by review or by a separate suit. The appellant is entitled to her costs in this Court as well as in the Lower Appellate Court.

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Appeal allowed.

GANGA PROSAD

v.

RAJ COOMAR SINGH.*

1903
Feb. 23.

*Appeal—Order—Civil Procedure Code (Act XIV of 1892) ss. 244, 287 (e)—
Value specified in Sale Proclamation.*

An order passed by a Court disallowing the objection of a judgment-debtor, that the value of the property specified in the sale proclamation under s. 287, cl. (e) of the Code of Civil Procedure, was grossly inadequate, comes under s. 244 of the Code, and is therefore appealable.

SECOND APPEAL by the judgment-debtor, Ganga Prosad.

A property belonging to the judgment-debtor was ordered to be sold by public auction in execution of a decree. After the Munsif had caused a proclamation of the intended sale to be made under s. 287 of the Civil Procedure Code, the judgment-debtor put in a petition of objection stating that the value of the property specified in the sale proclamation was grossly inadequate. The Court disallowed the objection on the ground that if the property were sold at an inadequate price, the judgment-debtor might then apply to set aside the sale. The execution case was struck off, the attachment standing over.

On appeal by the judgment-debtor, the Subordinate Judge held that, although the Munsif had discretion to take evidence for the purpose of ascertaining the value of the property advertised for sale and ought to have exercised that discretion, as the

* Appeal from order No. 290 of 1902, against the order of Tej Chunder Mookerjee, Subordinate Judge of Chapra, dated July 25, 1902, affirming the order of Umesh Chunder Sen, Munsif of Chapra, dated April 14, 1902.

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order of the Munsif was passed under s. 287 of the Civil Procedure Code, no appeal lay to him from that order. The appeal was accordingly dismissed.

Babu Raghu Nandan Prosad for the appellant.

No one appeared for the respondent.

GHOSE AND PRATT JJ. The application which the judgment-debtor made to the Munsif, upon which his order of the 14th April 1902 was made, related to a matter contemplated by section 287, clause (e), Code of Civil Procedure, namely, the value of the property to be specified in the sale proclamation, the judgment-debtor asserting that the amount as mentioned in that paper was grossly inadequate. The Munsif did not go into any evidence on this matter upon the ground that, in his view, the sale might be hereafter set aside if the property be sold at an inadequate price, the result being that the sale proclamation, as it was originally issued, was maintained.

Against this order of the Munsif, the judgment-debtor appealed to the higher Court; and the Subordinate Judge has dismissed the appeal upon the simple ground that no appeal lay against the order of the Munsif.

We think that in this respect the Court below was in error, because the order made by the Munsif was an order between the parties as falling under section 244, Civil Procedure Code; and, if so, it is obvious that an appeal did lie to the higher Court. We accordingly set aside the order of the Subordinate Judge, and send back the record to him for retrial of the appeal preferred to him. The costs will abide the result.

M. N. R.

Appeal allowed : case remanded.

MATANGINI DEBI

v.

GIRISH CHUNDER CHONGDAR.*

1908

March 8.

Sale in execution of Certificate—Public Demands Recovery Act (Bengal Act I of 1895) ss. 15, 19, 32, 33—"Final," meaning of—Appeal—Review—Revision—Power of revision by Commissioner.

A suit to set aside a sale in execution of a certificate under the Public Demands Recovery Act is maintainable in the Civil Court.

Ram Taruck Hazra v. Dilwar Ali (1) referred to.

An order made by a Certificate Officer under section 19 of Bengal Act I of 1895, is final only in the sense that it shall not be open to appeal as provided by s. 32 of that Act, but not in the sense that it shall not be open to review or revision by the Commissioner under s. 33 of the same Act.

Nasiruddin Khan v. Indronarayan Chowdhry (2), *Badaricharya v. Ramchandra Gopal Savant* (3), and *Ramsing v. Babu Kienning* (4), relied upon.

SECOND APPEAL by the plaintiffs, Matangini Debi and others.

An *ayma* mehal bearing towji No. 1274 in the Burdwan Collectorate was sold for arrears of cess under s. 21 of Bengal Act I of 1895 on the 31st January 1896. Thereupon the plaintiff No. 3 applied to set aside the sale on making the necessary deposit under s. 19 of that Act. He alleged that under the terms of a permanent lease which the plaintiffs held of the shares of the defendants Nos. 2 to 6 in the property sold as well as of other properties belonging to the said defendants, they (the plaintiffs) were liable to pay damages in case of default in payment of revenue and cesses on account of the towji that might fall due by them, and that, in the circumstances, he was competent under s. 19 of Bengal Act I of 1895 to

* Appeal from Appellate Decree No. 556 of 1900, against the decree of B. L. Gupta, District Judge of Burdwan, dated Dec. 22, 1899, reversing the decree of Hara Kumar Dass, Munsif of Burdwan, dated Aug. 31, 1898.

(1) (1901) I. L. R. 29 Calc. 73.

(3) (1898) I. L. R. 19 Bom. 113.

(2) (1866) B. L. R. Sup. Vol 367;
5 W. R. 98.

(4) (1893) I. L. R. 19 Bom. 116.

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make the necessary deposit and to have the sale set aside. The deposit was made and the sale set aside by the Certificate Officer on the 14th February 1896. The auction-purchaser then appeared and objected to the cancellation of the sale on the ground that the plaintiff No. 3 was not a party entitled under s. 19 of the Act to make the deposit and apply for the cancellation of the sale. Thereupon the Certificate Officer, after hearing both the sides, held that he had the power to review his order dated the 14th February 1896, and being of opinion that the applicant, plaintiff No. 3, was not a person who claimed *through* the judgment-debtor, and that his leasehold interest was not disturbed by the sale, set aside the aforesaid order and confirmed the sale on the 20th March 1896. On appeal the Collector restored the first order of the Certificate Officer cancelling the sale. Thereupon the auction-purchaser moved the Commissioner to revise the order of the Collector, and the Commissioner held that the Collector had no jurisdiction to hear the appeal, and restoring the order of the Certificate Officer passed on review, confirmed the sale.

The present suit was instituted by the plaintiffs for a declaration that they were entitled to make deposit under s. 19 of Bengal Act I of 1895, and that the orders of the Certificate Officer dated the 20th March 1896 and of the Commissioner affirming the same on revision were *ultra vires*. There was also a prayer for the cancellation of the sale.

The defendant No. 1, who was the auction-purchaser, alone appeared and took various objections in bar of the suit.

The Munsif held that the plaintiffs had sufficient interest in the sale to entitle them to make a deposit under section 19 of the Act; that the Certificate Officer had no power to review his first order cancelling the sale, and that all proceedings of the revenue authorities subsequent to that order were *ultra vires*. He accordingly decreed the suit and directed the sale to be set aside as illegal.

On appeal the District Judge held that no suit was maintainable to set aside a sale in execution of a certificate where it was found that there was an unsatisfied arrear of cesses at the time of the sale. He relied upon the case of *Troyluckho Nath*

Mosumdar v. Pahar Khan(1) as a direct authority on the point. He also held that there was no reason why the Certificate Officer could not review his own *ex-parte* order or why the extensive revisional powers conferred on the Commissioner by section 33 of the Act were taken away in this particular case. The District Judge accordingly decreed the appeal and dismissed the suit.

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Dr. Rashbehary Ghose and Babu Nalini Ranjan Chatterjee for the appellants.

The Advocate-General (Mr. J. T. Woodroffe) and Babu Saroda Charan Mitra and Babu Charu Chandra Ghose for the respondents.

BATERJEE AND HENDERSON JJ. This appeal arises out of a suit brought by the plaintiffs-appellants for a declaration that they were persons entitled to make a deposit under section 19 of the Public Demands Recovery Act I of 1895 (Bengal Council), and that the order of the Deputy Collector made upon review under that section confirming the sale and the order of the Commissioner under section 33 of that Act confirming the sale were *ultra vires*, and for cancellation of the sale. The defence was that the suit was not maintainable; that the orders complained of were not *ultra vires*, and that the sale should not be cancelled. The first Court decreed the plaintiffs' suit. On appeal the Lower Appellate Court reversed that decree and dismissed the suit on two grounds—*first*, that the suit to set aside the sale in execution of a certificate is not maintainable, where, as in this case, it is found that there was an unsatisfied arrear of cesses due at the time of the sale, and, *secondly*, that the orders under section 19 and section 33, which the plaintiffs asked the Court to hold as being *ultra vires*, were really not so.

In second appeal it is contended on behalf of the plaintiffs-appellants that the first ground of the Lower Appellate Court's judgment is wrong, and the case of *Troyluckho Nath Mosumdar v. Pahar Khan*(1), in reliance upon which the Lower Appellate Court has held this suit as not maintainable, has been overruled by the Full Bench decision of this Court in the case of *Ram Taruck Hasra v. Dihwar Ali*(2); and that the second ground

(1) (1896) I. L. R. 23 Calc. 641.

(2) (1901) I. L. R. 29 Calc. 73.

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of the judgment is also erroneous, it being argued that the order made by the Certificate Officer to set aside the sale under section 19 of Act I of 1895 was a final order under sub-section 4 of that section, and was neither open to review by the Certificate Officer nor subject to revision by the Commissioner under section 33; and that the subsequent orders interfering with that first order were *ultra vires*, and should be treated as a nullity, and if that is so, the first order setting aside the sale should be held to be the only order in the case, and the sale should be declared by the Court as cancelled.

The contention on behalf of the appellants that the first ground of the Lower Appellate Court's judgment is erroneous is in our opinion correct. The case of *Troyluckho Nath Mozumdar v. Pahar Khan*(1), in reliance upon which the Lower Appellate Court has held this suit as not maintainable, has been overruled by the Full Bench decision in the case of *Ram Taruck Hazra v. Dilwar Ali*(2).

It has been argued for the respondent that section 15 of the Act I of 1895 was a bar to the civil suit unless it is brought under certain conditions which have not been fulfilled in this case. We do not think that section 15 has any bearing upon this suit. If the contention of the learned vakil for the appellants, that the first order of the Certificate Officer under section 19, setting aside the sale was absolutely final in the sense not only of its not being open to appeal, but of its not being open either to review or revision by the Commissioner under section 33 of the Act, be correct, then all the subsequent orders would be *ultra vires*, and the suit would lie and would not be liable to be dismissed. Was that order really so? That is the question upon which the whole case turns. The contention on behalf of the appellants is that as sub-section 4 of section 19 says any order made by the Certificate Officer under this section shall be *final*, and as there is nothing to indicate that the finality intended by the section is finality so far as regards interference by an Appellate Court is concerned, we should hold that the intention of the Legislature was to make it final in the sense of not being open to appeal or review or

(1) (1896) I. L. R. 23 Calc. 641.

(2) (1901) I. L. R. 29 Calc. 73.

revision. It was suggested that as the order contemplated by the section was of a remedial character, restoring the property sold to its former owner and compensating the auction-purchaser by awarding him one-tenth of the auction price in addition to the purchase-money, the Legislature might well have intended to make the order absolutely final.

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On the other hand, it is contended for the respondent that the finality intended by sub-section 4 of section 19 is only finality so far as interference by an Appellate Court is concerned; that that would not prevent the Certificate Officer from reviewing the order; nor would it prevent the Commissioner under section 33 of the Act from revising it; and it was pointed out that although section 19, sub-section 2, directs the Certificate Officer to set aside the sale on certain conditions, there is nothing to prevent the Certificate Officer from making an order under the section refusing to cancel the sale as he has done in this case, if not in the first instance, but upon review, and that in such cases the reason given for making the order absolutely final cannot hold good.

After considering the arguments on both sides and the authorities cited, we are of opinion that sub-section 4 of section 19 of the Public Demands Recovery Act of 1895 (B.C.), in saying that any order made by the Certificate Officer under the section shall be final, only means and intends that it shall not be open to appeal such as is provided by section 32; and that the intention is not to make the order absolutely final so as to make it not open to review or revision. Although in most cases the order contemplated by section 19 can only have a remedial effect, there may be cases where a Certificate Officer erroneously refuses, after deposit, to cancel a sale where he ought clearly not to do so; and to hold that there is no power which can set him right by revision, would be to hold what the Legislature could never have contemplated, especially when section 23 of the Act, after providing that no appeal shall lie from certain orders, says that the Commissioner may in any case in which he thinks fit revise any order passed by a Certificate Officer or certain other Revenue Officers. The view we take that the words "shall be final" in section 19, sub-section 4, have the qualified meaning indicated above and, not the unqualified signification for which the learned vakil for the

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appellants contends, is in accordance with that taken in the case of *Nasiruddin Khan v. Indronarayan Chowdhry*(1), which had reference to exactly the same words occurring in the Civil Procedure Code of 1859, with regard to an order made upon an application for review of judgment. And the same view has in effect been taken by the Bombay High Court in the case of *Badaricharya v. Ramchandra Gopal Savant*(2) and *Ramsing v. Babu Kisansing*(3). That being so, and the order in question being in our opinion open to revision by the Commissioner under section 33 of the Public Demands Recovery Act, and the Commissioner having under that section affirmed the sale, it becomes unnecessary to consider the further question whether it was open to a Certificate Officer himself to review the order when no power of review is conferred on him by the Act—a question upon which the case of *Lala Pryag Lal v. Jai Narayan Singh*(4) may lend some support to the appellants' contention.

The result is that the appeal fails and must be dismissed with costs.

M. N. R.

Appeal dismissed.

(1) (1866) B. L. R. Sup. Vol. 367;
 5 W. R. 93.

(3) (1893) I. L. R. 19 Bom. 116.

(2) (1893) I. L. R. 19 Bom. 118.

(4) (1895) I. L. R. 23 Calc. 419.

ORIGINAL CIVIL.

SURAJ PROSAD

v.

STANDARD LIFE INSURANCE COMPANY.*

1903

May 4.

*Practice—Examination of Witness on Commission—Prolonged and unnecessary
Cross-examination.*

Where the Court is satisfied that the cross-examination of any witness on commission is being unnecessarily prolonged, it will order such cross-examination to be concluded within a certain time.

THIS was an application by the defendant Company, on notice to the plaintiff, who did not appear, asking for an order that the cross-examination of a witness, Lala Gurnarain, called on behalf of the defendant Company and being examined on commission in Lucknow, be declared concluded.

It appeared that, in pursuance of an order of this Court dated the 24th day of February 1903, the District Judge of Lucknow had delegated Shama Churn Banerjee, an advocate, as Commissioner to take the evidence of certain witnesses in Lucknow on behalf of the defendant Company and amongst others of the said Lala Gurnarain.

The application was supported by affidavits, from which it appeared that the suit was instituted for the recovery of the sum of Rs. 50,000 alleged to be due to the plaintiff as the alleged assignee of a policy of insurance on the life of one Lala Khoonoolall, since deceased, and dated the 19th of March 1900; that the principal facts sought to be proved through the witnesses, on commission, were that Lala Khoonoolall had suffered from diseases which, as well as the names of the various doctors by whom he had been treated, had been fraudulently concealed from the defendant Company; and that the statements made by the assured with regard to his age were untrue both to his knowledge and to that of the plaintiff and the members of his firm.

* Application in Original Suit No. 503 of 1902.

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It was further stated in the said affidavits that Lala Gurnarain in his examination-in-chief deposed to the fact of the marriage of his sister with Khoonoolall and to the subsequent *gowna* ceremony following such marriage, and in support of this oral testimony produced two books of account of his father's banking firm of Dilsook Roy Jugger Nath; that the examination-in-chief of Lala Gurnarain by the defendant's counsel lasted 7½ hours; and that the cross-examination of the said witness by the plaintiff's pleader was then proceeded with.

It further appeared that, after such cross-examination had lasted 42 hours, the defendant's counsel gave notice to the plaintiff's pleader that unless the cross-examination were concluded in the course of that day, he would apply to this Court for relief against an abuse of cross-examination; that the said cross-examination had not concluded by the end of that day, and that accordingly the defendant's counsel had withdrawn the said witness, after a cross-examination extending to over 47 hours, until the directions of this Court should be obtained; that the questions put to the said witness were largely irrelevant and immaterial; and that the cross-examination was conducted generally with the object and in a manner calculated to delay the proceedings, and harass the witness.

It further appeared that the remaining witnesses to be called on behalf of the defendant Company had since been disposed of both in examination-in-chief and cross-examination, and that the said witness, Lala Gurnarian, was then undergoing a continuation of his cross-examination.

Mr. Dunne (Mr. J. G. Woodroffe with him), in support of the application, referred to the case of *Nistarini Dassi v. Nundo Lall Bose*(1) in which a similar application(2) was granted by Stanley J.

May 4.

STEPHEN J. In this case it is shown by affidavits that there has apparently been a prolonged and unnecessary cross-examination. Considering the application which was made on a previous occasion on behalf of the plaintiff for adjournment and the

(1) (1899) I. L. B. 28 Calc. 591; 891.

(2) Unreported.

non-appearance of the plaintiff to-day, I think it is my duty to order that the cross-examination of Gurnarain do close on Tuesday. This order is not to affect the defendant's right to re-examine.

Costs reserved.

The Registrar to be at liberty to telegraph the effect of this order to the Commissioner.

Attorneys for the plaintiff: *Wilson & Co.*

Attorneys for the defendant: *Dignam & Co.*

J. E. G.

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ISSUR SINGH

v.

G. BERGMANN.*

1903
April 29.

Practice—Stay of Proceedings in Small Cause Court—Transfer of suit on a Promissory note—Suit for an account in the High Court—Procedure—Matter of convenience rather than of right—Costs.

As a general rule, it would be no answer as regards a suit in the Small Cause Court upon a promissory note, for the defendant in that suit to say that the claim is a matter of account. But if subsequently a suit is instituted in the High Court by the defendant in the Small Cause Court suit, in which all transactions between the parties can be dealt with, and if he gives security for the total amount of his indebtedness, then it is desirable that there should not be a separate proceeding in respect of the promissory note, though *prima facie* it does not constitute an item in a running account between the parties. The question of procedure becomes a matter of convenience rather than of right, and justice can be done between the parties by apportionment of costs after the account has been taken in the High Court suit.

ORIGINAL SUIT.

The plaintiffs, Issur Singh and others, who carry on business as traders at No. 10, Municipal Market, Calcutta, in winter cloths and woollen goods, used to indent for goods from Europe through the defendant, who is a merchant carrying on business under the name and style of B. Regold and Bergmann at No. 142, Radha Bazar Street, Calcutta, and who acted as indent agents of the plaintiffs. In respect of these various indents, drafts were drawn against goods, and security was given from time to time by the plaintiffs for the amounts due on those drafts. The security

* Original Civil Suit No. 26 of 1903.

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consisted of goods and also promissory notes executed in favour of the plaintiffs, which were endorsed over to the defendant. Payments were made by the plaintiffs from time to time in respect of their indebtedness to the defendant, and realizations were made by the defendant in respect of the security given by the plaintiffs. Subsequently, in place of two of the drafts, the plaintiffs executed two promissory notes in favour of the defendant. The defendant alleged that all these transactions were separate and distinct, and that all payments made by the plaintiffs were specifically appropriated to the transactions represented by the several indents, and that in that way all the indents were kept separate throughout the year. The defendant claiming to proceed on one of these notes and alleging that nothing had been paid on it instituted on the 9th of December 1902 a suit in the Court of Small Causes, Calcutta. Subsequently on the 14th of January 1903 the plaintiffs instituted this suit in the High Court for a general account to be taken of all the transactions between the plaintiffs and the defendant, and alleging that the said promissory note was a part of the transactions and could not be separated therefrom so as to give the defendant a separate cause of action with respect thereto, obtained a Rule calling upon the defendant to show cause why the suit instituted by him in the Small Cause Court should not be transferred to this Court in order that it might try and determine that suit together with this suit.

The suit and the Rule were heard together. No evidence was tendered.

Mr. Dunne (*Mr. K. S. Bonnerjee* with him) for the plaintiff. I ask that there may be a reference for the taking of accounts. The matter of the Rule for the transfer of the defendant's suit in the Small Cause Court may stand over till the accounts are taken and report made thereon. It is admitted there have been various dealings between the parties. I offer no evidence.

Mr. Sinha (*Mr. J. G. Woodroffe* with him) for the defendant. The whole object of the suit is to delay the payment of my claim in the Small Cause Court suit. The plaintiff is not entitled to an account at all. If he is, the promissory note on which

the defendant has sued in the Small Cause Court does not enter into the account: it is an isolated transaction. I am ready to prove that it is so.

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SALJE J. I think the question in this case really resolves itself into one of convenience.

It appears that the plaintiffs and the defendants carried on a business in which the defendants, acted as indent agents of the plaintiffs. The plaintiffs were in the habit of indenting for goods from Europe through the defendants, and in respect of those various indents, drafts were drawn against goods coming out. They were no doubt treated as separate transactions to a certain extent. It appears that subsequently security was given by the plaintiffs in respect of the amounts due from time to time on those drafts, the security consisting of goods and also promissory notes which were endorsed by the plaintiffs in favour of the defendants. It is alleged that payments were made by the plaintiffs from time to time in respect of their indebtedness. It is also said that realizations were made by the defendants in respect of the security given by the plaintiffs. The defendants, however, allege that all these payments were specifically appropriated to transactions represented by the indents, and in that way these indents were kept separate throughout the year. Subsequently in place of two of the drafts the plaintiffs gave the defendants two promissory notes, the notes bearing on their face interest at the rate of twelve per cent. per annum. The defendants claiming to proceed on one of these notes and alleging that nothing had been paid on it instituted a suit in the Calcutta Court of Small Causes. *Prima facie* I should judge that they were entitled so to do, the object of a promissory note is to show that the particular transaction represented by the note is a separate transaction, and it is intended that the remedies in respect of that transaction should be separately pursued. Subsequently, however, the plaintiffs instituted this suit for a general account to be taken of all the transactions between the plaintiffs and the defendants. I am not prepared to say upon the pleadings as they stand that the suit instituted by the plaintiffs in this Court in respect of all these transactions is in any sense a

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vexatious suit; nor is it desirable, in my opinion, that at this stage there should be an issue as to whether it is vexatious or not, because, after all, that question must depend upon the result of the account, and justice can be done between the parties by the apportionment of costs after the account has been taken. I propose to direct an account to be taken in this suit. I think that, so far as the promissory notes are concerned, they do not *prima facie* constitute items in a running account. I think, however, the fact that security has been undoubtedly given in respect of the total amount of indebtedness of the plaintiffs to the defendants makes it desirable that there should not be a separate proceeding in respect of one of those promissory notes, having regard to the fact that there exists a suit in the High Court in which all the transactions between the parties can be dealt with.

While, therefore, as a general rule, it would be no answer as regards a suit instituted in the Calcutta Court of Small Causes upon a promissory note for the defendants to say that the claim is a matter of account, the situation is altered when a suit such as the present one is instituted in this Court by the defendant in the Small Cause Court suit. The question of procedure then becomes, as I have already said, a matter of convenience rather than a question of right.

I, therefore, propose to refer it to the Official Referee to enquire and report what sum, if any, is due to the defendants or the plaintiffs in respect of the various transactions mentioned in the plaint and the written statement, and in making his report I desire him to state whether the sums paid to the defendants or the realizations made by them were in respect of any particular items in the account or in respect of the general indebtedness.

The probability is that when that report is made, there will be further materials before the Court enabling the Judge to deal with the costs of this suit and of the present application. The application for the stay of proceedings in the Calcutta Court of Small Causes must stand over until the report is made.

The costs of the suit and of the Rule are reserved.

Attorney for the plaintiffs: *S. K. Sirkar.*

Attorney for the defendants: *N. C. Bose.*

S. G. B.

MATRIMONIAL JURISDICTION.

BOYLE

v.

BOYLE.*

1902

May 13.

Divorce—Wife's costs—Dismissal of wife's petition—Liability of husband—Deposit or security for costs.

In a divorce suit where it is shown that the wife has no money of her own, the mere fact that no deposit has been made or security given for payment of the wife's costs is no obstacle to the making of an order against the husband to pay her costs, though her petition is dismissed.

Robertson v. Robertson(1), *Otway v. Otway*(2), and *Proby v. Proby*(3) referred to.

ORIGINAL SUIT.

After the petition of Mrs. Boyle for a divorce from her husband on the ground of incestuous adultery was dismissed, an application was made for an order directing the husband-respondent to pay the costs of the petitioner notwithstanding such dismissal. The petitioner had not during the hearing applied that a deposit should be made or security given by the respondent for her costs.

From the evidence adduced in the case it appeared that the petitioner had no money of her own, and it was admitted that the parties were not governed by section 4 of the Indian Succession Act, but were subject to the Married Woman's Property Act of 1882 (45 and 46 Vict. c. 75).

Mr. Aveloom (*Mr. Garth* with him) for the petitioner. On the authorities my client is entitled to the costs of the suit as between party and party. All the cases are given in Rattigan on Divorce, page 371, where the principle is stated: *Flower v. Flower*(4), *Jones v. Jones*(5), *Robertson v. Robertson*(1).

Mr. Knight (*Mr. Dunne* with him) for the respondent. The petitioner did not apply during the hearing of the suit for a

* Original Civil Suit No. 5 of 1902.

(1) (1881) L. R. 6 P. D. 119.

(3) (1879) I. L. R. 5 Calc. 357.

(2) (1888) L. R. 13 P. D. 141.

(4) (1873) L. R. 3 P. 132.

(5) (1872) L. R. 2 P. 223.

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deposit to be made or security given for her costs. She has presented her case to the Court without any aid from the respondent's pocket: the ground for making any order in her favour for costs no longer exists: *Sopwith v. Sopwith*(1), *Glennie v. Glennie*(2). The petitioner is governed by the Married Woman's Property Act, 1882, and therefore the dictum of Cotton J. in *Otway v. Otway*(3) would apply. The authorities cited in Rattigan do not support the proposition laid down by him. The cases there deal with the question of the solicitor's position when costs have been deposited. On the merits of this case no order for costs should be made.

HENDERSON J. As to the costs, I am asked to make an order directing the respondent to pay the costs of the petition notwithstanding that the petition has been dismissed.

Under clause 16 of the Indian Divorce Act, the High Court may order the costs of counsel and witnesses and otherwise to be paid by the parties or such one or more of them as it thinks fit, including a wife, if she have separate property, and section 7 of the same Act enables Courts in this country to give relief according to the principles and rules upon which the Divorce Court in England acts and gives relief. The principles and rules upon which the Court in England used to act in exercising its discretion as to a wife's costs are discussed in *Robertson v. Robertson*(4) and *Otway v. Otway*(3). It has been the rule in England, and it has been followed in this country also, that a wife should not be precluded by want of means from establishing her case either as petitioner or respondent, and it was usual for the wife to apply pending the hearing that the husband should make a deposit or give security for the estimated costs that might be incurred by his wife. At one time in England it was held that under Rule 159 of the English Divorce Court Rules the discretion of the Judge to allow costs at the hearing to the wife was limited to the amount for which security had been given or deposit made by the husband, but in *Robertson v. Robertson* it was decided that where the wife was allowed costs, and where

(1) (1860) 29 L. J. (P. & M.) 132.

(3) (1886) L. R. 13 P. D. 141.

(2) (1863) 3 Sn. & Tr. 109.

(4) (1881) L. R. 6 P. D. 119.

here were no improper proceedings taken on her behalf she should be entitled to the actual costs incurred by her. In the present case the petitioner did not apply that a deposit should be made or security given by the respondent for her costs, and now that the hearing has been concluded, it is said that she has not been precluded from establishing her case by any want of means, and that no order therefore can now be made against the respondent for payment of her costs.

It seems to me, however, that if an order can be made allowing costs in addition to the amount for which security has been given or to the amount deposited, there is no reason why in cases where no security has been given or deposit made an order should not be passed directing the husband to pay all costs reasonably incurred by his wife. *Robertson v. Robertson*(1) and *Otway v. Otway*(2), however, were both cases with respect to marriages which took place prior to the Married Woman's Property Act, 1882. In *Otway v. Otway*(2) at page 155 of the report, Cotton L. J. said :—"If this marriage had been after the Act of 1882, we should have had to consider how far that old rule would apply where a woman was put, after that Act, in the position of a *femme sole* retaining all her property, and being in a position to sue and be sued. But these parties were married in 1879, before that Act; and although a married woman married before that Act does retain a right to property which comes to her after the passing of the Act; and though under the Act of 1870 she has a right to certain property which came to her after the Act, we do not know that she had any such property, and, therefore, in my opinion we must decide this case independently of the position of a married woman under the recent legislation. If a case comes before us where a married woman has been married after the Act of 1882, it will be a very serious question for consideration how far we ought to follow the old rule, or what decision we ought to give. I only mention that to show that it does not in the present case, I think, affect the decision, and we do not in any way fetter ourselves by the present decision as regards any case which may arise as regards a woman married after the Act of 1882."

(1) (1881) L. R. 6 P. D. 119.

(2) (1888) L. R. 13 P. D. 141.

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Now it seems to be admitted that the parties here are not governed by section 4 of the Indian Succession Act, but are subject to the Married Woman's Property Act, 1882.

My attention has not been drawn to any case since that of *Otway v. Otway*(1), in which the effect of that Act has been considered in England as regards a woman married since the passing of it, but in this country in *Proby v. Proby*(2), which turned upon the effect of section 4 of the Indian Succession Act—a provision which places married women to whom it applies somewhat in the same position as women subject to the Married Woman's Property Act, Pontifex and Wilson JJ., without saying that under no circumstances will the Court order a husband to give security for his wife's costs, expressed an opinion that it should be done under special circumstances only, and there being no special circumstances shown, these learned Judges refused the application that the husband should be ordered to deposit the estimated costs of his wife, the petitioner. From the evidence in the case before me, it appears that the petitioner has no money of her own, and it was admitted that if an application had been made before the hearing for the respondent to give security or to deposit the amount of the estimated costs of the petitioner there would have been no answer. Had an order for the respondent to make a deposit or give security for costs been made, I should have allowed the petitioner her costs; and if these costs had exceeded the estimated costs, I should not have limited the order to the amount estimated. In a case where it is shown that the wife has no money of her own, I do not think the mere fact that no deposit has been made or security given should be an obstacle to the making of an order against her husband to pay her costs. I therefore direct the respondent to pay his wife's costs as between party and party on scale No. 2. The order does not, however, cover the costs of the Commissioner sent down to Midnapore, as those costs have been separately dealt with.

Attorneys for the petitioner: *Leslie and Hinds.*

Attorneys for the respondent: *Orr, Robertson and Burton.*

S. C. B.

(1) (1893) L. R. 13 P. D. 141.

(2) (1879) I. L. R. 5 Cal. 357.

## PRIVY COUNCIL.

RAHIMUDDIN

v.

REWAL.\*

P.C.\*  
1903Feb. 17.  
March 25.

[On appeal from the Chief Court of the Punjab.]

*Pre-emption—Punjab Laws Act (XII of 1878) ss. 10, 12—“Village Community”  
—Act IV of 1872, s. 14—Occupancy tenants in zamindari village.*

The expression “village community” in the Punjab Laws Act (XII of 1878) is not used to denote a village community of the typical sort consisting of members of one family or one clan holding the village lands in common, and dividing between them the agricultural lands according to the custom of the village; but is used to denote a body of persons bound together by the tie of residence in one and the same village, amenable to the village customs, and subject to the administrative control of the village officers.

A “village community” is not confined to the land-owners in the village.

Occupancy tenants are members within the meaning of the Punjab Laws Act, and so are all persons in an inferior position who belong to the village, though they may be unconnected with the land and not entitled to any right of pre-emption under the Act.

APPEAL from a decision (12th April 1897) of the Chief Court of the Punjab, which reversed a decision (31st March 1894) of the Subordinate Judge of Hissar who had dismissed the suit of the respondents with costs.

The representatives of the second defendant, Shaik Allah Dia, appealed to His Majesty in Council.

The suit was brought for possession of a village called Mandla Khara, of which the plaintiffs claimed the right of pre-emption as occupancy tenants,—a status which they or their predecessors had occupied since 1863.

The village originally belonged to a single proprietor, one Daulat Ram, a Thakur by caste. He was succeeded by his widow, Rani Anandi, who transferred it to her daughter's son, Bukhtawar Singh. Subsequently, one Hena Mall, a

\*Present: Lords Macnaghten, Davey, Robertson and Lindley, Sir Andrew Scott and Sir Arthur Wilson.

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mahajun, caused it to be sold in execution of a decree, and at that sale, in or about 1854, it was purchased by Alexander Skinner who established the *abadi* or village site, and induced cultivators to reside on it. On his death his son became the sole proprietor, and he died on 19th January 1892.

The *wajib-ul-ars* of the village expressly recorded that "as the estate absolutely belongs to my principal, and as none of the present co-sharers of the Skinner estate, or the present heirs of Colonel Skinner, or those appointed as such in future has or will have any connection or concern with the estate, except my principal, the estate being self-acquired property, he shall have in his lifetime every power to alienate for his personal necessity or for payment of arrears of Government revenue to whomsoever he may like."

On 7th January 1893, Mr. Kirkpatrick, the first defendant in the suit, acting under the authority of a declaration of trust dated 8th February 1879, made by Alexander Skinner, sold the village of Manda Khera to the second defendant, Allah Dia, and this sale the plaintiffs in their plaint, filed on the 17th November 1893, alleged to be their cause of action. Clause 3 of the plaint stated that "the plaintiffs are occupancy tenants in Manda Khera, and the defendant No. 2, vendee, has no right whatever in the said village: hence according to law and the custom obtaining in the Punjab, the plaintiffs' right of pre-emption is superior to that of the vendee." They stated the price of the village to be Rs. 11,320-6-6 and claimed pre-emption on payment of that sum.

The defendants filed written statements in answer to the claim, in which they alleged that the plaintiffs had by law no right of pre-emption on the sale of an entire village belonging to a single proprietor, the right only accruing when the share of a member in a joint community was sold, that is to say, when the property sold was situated within, or was a share of, a village if (i) it belongs to one or more of a greater number of joint and undivided sharers; (ii) it is part of a village held in ancestral shares by several proprietors; and (iii) it is part of a *patti* or other subdivision of a village. The defendants also denied that there were was any custom which gave the plaintiffs

the right of pre-emption, there being no necessity for any custom to provide for the exclusion of strangers owing to the fact that the proprietors of the village had for some time past been of a different race and religion from those of the tenants. The second defendant further pleaded that the claim to pre-emption could not succeed, as the plaintiffs were suing also on behalf of others who were not occupancy tenants; that the plaintiffs were occupancy tenants of only a small area of the village; and that the price of the village fixed by them was not correct.

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Issues were raised on these pleadings, of which the first only is now material:—

“Have the plaintiffs by law or custom a preferential right to purchase the property in suit to that of Sheik Allah Dia, the vendee?”

On this issue the judgment of the Subordinate Judge was as follows:—

“On the first issue I have no doubt, from the wording of ss. 10 and 12 of the Punjab Laws Act, as also from the case reported in Punjab Record No. 103 of 1889, that the law applies to the case of a sale of an entire village belonging to a single proprietor, but as a zemindari village is not shown under s. 12 of the Act, I fail to see how the plaintiffs can exercise the right of pre-emption in such property. I may add here that I do not agree in the defendant's contention, that occupancy tenants are not members of a ‘village community,’ as the term ‘community of landholders’ does not appear in the present law. As the plaintiffs cannot exercise the right they claim by law, it has now to be seen whether they can succeed by custom. I find that they have failed to prove by a single instance that occupancy tenants have successfully exercised the right before in a case like the present one, and as the plaintiffs or their predecessors got occupancy rights only at the settlement of 1863-64, and no sales beyond the one now in dispute took place in their village since then, it is obvious that no such custom can exist in their village. I find against the plaintiffs on the first issue.”

When the case came on appeal before the Chief Court the same question had arisen in another appeal (No. 1365 of 1893) then before them, in which the opinion of a Division Bench of the Court was given as follows:—

“The real contention is that the right of pre-emption cannot be presumed to exist in Faridpur under s. 10 of the Punjab Laws Act because that section applies only to village communities, and Faridpur was not a village community at the time of the sale, as it belonged to a single proprietor. It is admitted that the custom of pre-emption may be proved to exist in Faridpur, but it is contended that such custom has not been established. It is further contended

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that s. 12 of the Punjab Laws Act has no application because the property to be sold was not situate within, or a share of, a village, but was a whole village. This latter contention may be at once overruled. The sale deed shows that the whole village was not sold, but only that portion of it which had not been acquired by Government. Even if the property to be sold was the whole of Faridpur, it was none the less situate in a village in the sense that it was situate within its own circumscribing limits. The wording of s. 12 would have been more clear and explicit if the words 'is a village or' had been introduced between the words 'foreclosed' and 'is' in the first clause, but we feel no doubt that the Legislature intended s. 12 to apply to whole villages as well as to parts of them, and we do not consider that we are stretching language in holding that a village is situate within itself. The word 'village' in s. 12 is used in contradistinction to the words 'town' and 'city' in s. 11, and the object of s. 12 is to declare the precedence of pre-emptors *inter se* and not in any way to restrict their rights to the pre-emption of sales of parts of, and shares in, villages. Faridpur originally belonged to Colonel Skinner, who died in December 1841. On his death it devolved on his heirs, and was certainly a village community at that time. On partition in 1888 it was assigned to Mrs. Victoria Ingram, who is said to have been sole proprietor at the time of the sale to defendants 2, 3 and 4 and who alleged herself to be such. According to Ram Sarup Patwari 16 bighas 10 biswas belong to one Allah Bakhsh, and if this is the case, Mrs. Ingram never was sole proprietor; but even if Ram Sarup's statement is not true, we are still of opinion that Faridpur was a village community at the time of the sale. One of appellants' chief points is that the wording of s. 14 of Act IV of 1872 shows that the Legislature drew a distinction between occupancy tenants and members of the village community, and evidently did not include the former among the latter.

"S. 14 declares that if the property to be sold is situated within, or is a share of, a village, the right to accept the offer referred to in s. 13 belongs in the absence of custom to the contrary, thirdly, to any member of the village community: fourthly, to tenants with rights of occupancy in the village, if any. The above wording tends to support appellants' contention, but the wording of s. 12, Act XII of 1878, which superseded s. 14, Act IV of 1872, does not support it any way. There is nothing in it to show that the Legislature did not consider that occupancy tenants are not members of the village community, and the fact that the words 'to any landholder of the village' were substituted by Act XII of 1878 for the words 'to any member of the village community' in Act IV of 1872 tends to show that it was considered that occupancy tenants are members of the village community, and that it was necessary to distinguish them from members who are landholders, and to postpone their pre-emptive rights to those of such landholders. The village of Faridpur is situated in the Karnal district, and we may note that Mr. Ibbetson in the chapter on the village community in his settlement report speaks of the proprietary body proper as forming the nucleus round which the subsidiary parts of the community are grouped. We see no reason why the words 'village community' in s. 10 of the Punjab Laws Act should not be construed as including not only the members of the proprietary body, but also all those individuals who dwell within the village boundaries and whose rights and duties are as clearly defined as



those of the proprietors themselves. Whether as proprietors or tenants, or menials, or shopkeepers, or village officers, they are all members of a community or body associated together for the purpose of maintaining themselves and others, and none of them can be said to be wholly independent of the others. Wherever there is such a community, the right of pre-emption must be presumed to exist, though it would not be exercisable by any members of the community other than those referred to in s. 12. If there are no such members, it cannot be exercised, though there is no reason why it should not exist. It may remain dormant for a time, and then again become exercisable. We must hold that plaintiffs, as occupancy tenants, have a right of pre-emption."

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The judgment now under appeal was given by a Division Bench (CHATTERJI and STODDON JJ.) of the Chief Court of the Punjab a few days later, and the material portion of it was as follows:—

"As regards the plaintiffs' right to sue, the question has been fully considered and all the arguments raised by the respondents disposed of in No. 1865 of 1898. Exactly the same points arise in the present appeal, and we consider it unnecessary therefore to discuss them afresh in this judgment. Following the decision in the other case, we hold that plaintiffs as occupancy tenants in the village are entitled to acquire it in preference to the purchaser, who is an entire stranger."

The appeal was therefore allowed, the decree of the Subordinate Judge was reversed, and the suit decreed with costs.

On this appeal, which was heard *ex-parte* :

*Sir W. Rattigan, K. C.*, and *C. W. Arathoon*, for the appellants, contended that the respondents were not entitled to any right of pre-emption of the village in suit. No custom of pre-emption had been proved. The village was, and had been for many years as the *wajib-ul-ars* showed, the self-acquired property of a single owner, who had the absolute power of disposing of it, and the members of whose family had no connection or concern with it whatever, which facts are quite inconsistent with the existence of the right of pre-emption claimed. The Punjab Laws Act (XII of 1878) gave the respondents no such right. It could not be presumed to exist under that Act. S. 12 did not confer the right of pre-emption: it must be proved unless it could, from the circumstances, be presumed under s. 10 to exist. If this were not so, cl. (a) of s. 10 would be unnecessary. For any presumption to arise in this case the respondents must show that they form a "village community" within the meaning of s. 10. But that expression meant, it was submitted, a

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community of landholders. A member of a village community could, under the Act, be synonymous with no one but a landholder. This was the inference to be drawn from the alteration of the former Act (IV of 1872) by the Act of 1878: s. 14 of the Act of 1872, corresponding with s. 12 of the Act of 1878, and Baden-Powell on Village Communities, Edition of 1896, page 26, were referred to. A "village community" would not include any one except a village proprietor, and here the whole village belonged to a single proprietor. Occupancy tenants or mere cultivators did not come within that expression. Reference was made to the Punjab Record No. 74 of 1897. The Punjab Laws Act did not apply to the case of a zemindari village like the one in suit, nor to the case of the sale of a whole village.

.The judgment of their Lordships was delivered by—

**LORD MACNAGHTEN.** This is an appeal *ex-parte* against a decree of the Chief Court of the Punjab pronounced in favour of the respondents who were plaintiffs in the suit.

The respondents are occupancy tenants in the village of Manda Khera, a zemindari village owned by a single proprietor. On the death of the owner in 1892 the village was sold under the authority of a declaration of trust, and sold to a stranger. Thereupon the respondents, taking their stand on Act XII of 1878, an Act passed for the purpose of amending the Punjab Laws Act, 1872, claimed pre-emption of the whole village. There was no preferential claim.

It was not disputed at their Lordships' bar that there would be no answer to the claim of the respondents if the provisions of the Act of 1878 apply to the case. It was, however, contended on behalf of the purchaser, who was a defendant in the suit and is now represented by the appellants, that the respondents cannot claim the benefit of the Act because, although Manda Khera is a village, no village community is to be found in it.

The argument was mainly founded on section 10 of the Act of 1878. The provisions with regard to pre-emption begin with section 9. Section 9 declares that "the right of pre-emption is a right of the persons hereinafter mentioned or referred to to acquire in the cases hereinafter specified immoveable property in preference to all other persons." The section goes on to explain

that the right arises in respect of sales and foreclosures. Section 12 declares that "if the property to be sold . . . is situate within . . . a village, the right to buy . . . belongs, in the absence of a custom to the contrary," to certain classes of persons therein described in succession one after the other. Among them, in the sixth place, come "the tenants (if any) with rights of occupancy in the property," and, seventhly, "the tenants (if any) with rights of occupancy in the village."

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Those two sections, 9 and 12, taken together seem to be complete in themselves and plain enough. But between them are sections 10 and 11. It is section 10 which creates, or is supposed to create, the difficulty. It declares that "unless the existence of any custom or contract to the contrary is proved, such right," that is, the right of pre-emption, "shall, whether recorded in the settlement record or not, be presumed—

"(a) To exist in all village communities, however constituted."

Section 11 declares that the right "shall not be presumed to exist in any town or city, or any subdivision thereof, but may be shown to exist therein."

The argument, as their Lordships understood it, was to this effect. Before the benefit of the provisions of section 12 can be invoked, the existence of a right of pre-emption must be either presumed or proved. In villages the right is presumed to exist if there be a village community, but if that condition is wanting there must be proof of custom. In the present case there is no evidence of custom at all. There can be no village community because the whole village was in the hands of a single proprietor. Two persons at least are required to make a community, and they must be landowners. The result of this argument would be that the rights of occupancy tenants would be made to depend on the question whether the village belonged to one or more than one landowner—a matter which does not of itself seem to affect or concern the position of the tenant in relation to strangers, whose exclusion is aimed at by the law of pre-emption. There is certainly ground for contending that the generality of sections 9 and 12 is not cut down by sections 10 and 11. These sections apply a different rule in the case of villages from that which is applicable in the case of

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towns and cities. And it may well be that they were not intended to do more, though no doubt the introduction of the expression "village communities" where the expression "villages" would suffice does introduce an element of obscurity. It is not, however, necessary to pursue this subject further or to determine the point, because their Lordships agree with the Chief Court in thinking that the expression "village communities" in the Act of 1878 is not used to denote a village community of the typical sort consisting of members of one family or one clan holding the village lands in common and dividing between them the agricultural lands according to the custom of the village. It seems rather to be used in a popular sense to denote a body of persons bound together by the tie of residence in one and the same village, amenable to the village customs, and subject to the administrative control of the village officers. There seems to be no reason why a village community should be confined to the landowners in the village. In their Lordships' opinion occupancy tenants are members of a village community within the meaning of the Act, and so are all persons in an inferior position who belong to the village, though they may be unconnected with the land and not entitled to any right of pre-emption under the Act of 1878. That was the view of the learned Judges in the Chief Court, and their Lordships see no reason to differ from them.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be dismissed.

*Appeal dismissed.*

Solicitors for the appellants : *T. L. Wilson & Co.*

J. V. W.

# CRIMINAL REVISION.

MOTI LAL PAL

v.

THE CORPORATION OF CALCUTTA.\*

1908

May 19.

*Adulteration—Mustard oil (as commercially known)—Sale “to the prejudice of purchaser”—Manufacture for sale—Calcutta Municipal Act (Bengal Act III of 1899) s. 495.*

Where a Food Inspector purchased samples of mustard oil from the manufactory of the accused, which on analysis were found to be adulterated with *til* oil, and the accused were convicted under s. 495 of Bengal Act III of 1899 :—

*Held*, that such adulterated oil not being what is commercially known as mustard oil, and the adulteration being to the prejudice of the purchaser, the accused had been rightly convicted.

*Baishtab Charan Das v. Upendra Nath Mitra*(1) distinguished.

RULE granted to the petitioner, Moti Lal Pal.

This was a Rule calling upon the District Magistrate of the 24-Perganas to show cause why the conviction and sentence passed on the petitioner should not be set aside on the ground that, having found that the oil sold was an article of commerce, it was incumbent on the Magistrate to find whether or not it was an article commercially known as mustard oil before he could determine the guilt or innocence of the petitioner; and also it was incumbent on him to find whether or not the article sold, even if it was adulterated, was adulterated to the prejudice of the purchaser.

A Food Inspector employed under the Municipal Corporation of Calcutta purchased two samples of mustard oil from the manufactory of the petitioner. These were, upon analysis, found to be adulterated with *til* oil. The petitioner alleged that a small quantity of some hard seed like *til*, ground-nut, or poppy was always

\* Criminal Revision No. 346 of 1908, against the order of P. N. Mookerjee, Municipal Magistrate of Calcutta, dated Dec. 13, 1902.

(1) (1898) 3 C. W. N. 66.

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mixed with the mustard seed for the purpose of expressing all the oil from that seed; the proportion being one seer of the hard seed to one maund of the mustard seed.

The petitioner was convicted and fined under s. 495 of the Calcutta Municipal Act (B.O. III of 1899) by the Municipal Magistrate of Calcutta, and on appeal to the Sessions Judge of the 24-Perganas the conviction was upheld on the 27th February 1908.

*Mr. Hill (Babu Dwarkanath Mitra with him)* for the petitioner. In this case the petitioner has been convicted and fined under s. 495 of the Calcutta Municipal Act for selling to a Food Inspector mustard oil, which on analysis was found to be adulterated with *til* oil. In the case of *Baishtab Charan Das v. Upendra Nath Mitra*(1) it was held that what was commercially known as mustard oil was ordinarily prepared in the same manner as the sample oil which on analysis was found to have been adulterated by a mixture of oil from certain other seeds. This mixed oil is an article of commerce; so is pure mustard oil. If a man wants pure mustard oil, he goes to the particular place where it is sold; if he wants what is ordinarily known as mustard oil, he goes to the bazar. No one goes to the bazar to get pure mustard oil. S. 495 of the Calcutta Municipal Act is identical with s. 6 of the 'Sale of Food and Drugs Act' (38 and 39 Vict. C. 63) under which it has been held that the sale must be to the prejudice of the purchaser. If a man knows that there are two kinds of oil—one pure at a high price, the other impure or adulterated at a lower price, and he deliberately purchases the inferior article at the lower price, knowing it is adulterated, it cannot be said that he is prejudiced, because he knows what he is getting. *Til* oil is also an article of food and nutritious, and is used in the manufacture of sweets; the *til* seed is much dearer in price than mustard seed. In the jail a hand-mill is used, but there time and labour are of no object. Yule & Co. at first extract as much oil as they can in the ordinary way, and then they use hydraulic pressure by which they are able to extract all the oil. The ordinary manufacturer uses steam, and he is not able to get more than a certain quantity of oil, as the mustard seed becomes

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reduced into a jelly-like mass and cannot be pressed any more. In order to prevent this, a harder seed is put with the mustard seed, which gives a better resistance and enables the manufacturer to extract a greater quantity of the oil from the mustard seed.

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An article of commerce means something that can be made and sold at a profit. If the harder seed were not used, the mustard oil could not be sold at a profit and would then cease to be an article of commerce. The case falls within exception (a) of the section.

In *Goulder v. Rook*(1) four cases were considered under the Sale of Food and Drugs Act, 1875, where beer had been sold which contained arsenic. In one case the certificate of the analyst showed that some arsenic was found in the beer; in another case that the beer contained a serious quantity of arsenic. In both these cases there was a conviction under s. 6 of the Sale of Food and Drugs Act of 1875; but on appeal, the certificates were held to be insufficient, and the convictions were quashed, there being nothing to show what ordinary beer should contain, or what was the degree or amount of arsenic found in the beer. In the case of *Goulder v. Rook*(1), the conviction was also under s. 6; arsenious acid was found to the extent of not less than one-eighth of a grain per gallon, and it was proved that that quantity was such as to render the beer injurious to health; that being so, the Court of Appeal affirmed the conviction. We do not know in this case what quantity of oil was found by the analyst, nor is it proved to be injurious to health. In the case of *Smith v. Wisden*(2) a person asked for a pot of marmalade. The grocer sold him a pot of marmalade which was found to contain thirteen *per cent.* of starch glucose. There was no legal standard for the making of marmalade. The glucose to the extent used was not injurious to health. It was held that the sale was not to the prejudice of the purchaser within the meaning of s. 6 of the Sale of Food and Drugs Act, there being no evidence that the article supplied was inferior to the article demanded.

In the present case it is not shown that the oil purchased is inferior to the oil demanded by the purchaser. The adulterated oil is known in the commercial world as mustard oil, and is purchased

(1) [1901] 2 K. B. 290.

(2) (1901) 85 L. T. R. 760.

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with such knowledge at a lower price. There can be no prejudice, as the purchaser knows what he is purchasing, and gets what he demands.

*Mr. Dunne (Mr. Cotton and Babu Dwarka Nath Chakravarti* with him), for the Corporation of Calcutta, shewed cause. If a person asks for mustard oil and gets mustard oil mixed with *til* oil, surely he is prejudiced: he does not get the article he wants. Pure mustard oil is sold at 8 annas a seer, whereas the adulterated oil is sold at 6 annas. But the question is whether by selling the adulterated oil the petitioner is not selling an article which is not of the nature, substance or quality of the article demanded. It is no doubt necessary to look to the purpose for which the oil is used, to determine whether it is prejudicial to the purchaser. *Prima facie*, if a man purchases something as the genuine article, but gets an adulterated mixture, it must be to his prejudice. *Til* seed does not assist the expulsion of oil from the mustard seed. The reason given for adding the *til* seed is not correct. The real reason is that *til* oil is cheaper, and that relatively a greater quantity of oil can be extracted from the *til* seed than from any other kind of seed. If the addition of the *til* oil was any advantage to the purchaser, it would be proclaimed. When a man wishes to purchase mustard oil he expects to get it pure. Whether the adulterated oil is commercially known as mustard oil is for your Lordships to determine upon the evidence adduced. The fact that *til* oil is innocuous does not militate against my contention that it is to the purchaser's prejudice.

Mustard oil is different from the class of articles, such as beer or marmalade, which can be made in a number of different ways. It is not found that this admixture was necessary for manufacturing mustard oil. The case does not fall within any of the exceptions to s. 495 of the Municipal Act; and I submit that this Rule should be discharged.

**RAMPINI AND HANDLEY, JJ.** This is a Rule calling upon the District Magistrate of the 24-Perganas to show cause why the conviction and sentence passed on the accused should not be set aside on the ground that, having found that the oil sold was



an article of commerce, it was incumbent on the Magistrate to find whether or not it was an article commercially known as mustard oil before he could determine the guilt or innocence of the petitioner, and also it was incumbent on him to find whether or not the article sold, even if it was adulterated, was adulterated to the prejudice of the purchaser.

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The facts are that a Food Inspector, Dr. P. C. Lahiri, purchased two samples of mustard oil from the accused's manufactory. On analysis they were found to be adulterated with *til* oil. The accused was then tried and convicted under section 495 of the Bengal Act III of 1899 and sentenced to pay a fine of Rs. 200. On appeal to the Sessions Judge the conviction was affirmed, but the fine reduced to Rs. 50. The accused then obtained the Rule set forth above.

It is not denied that the mustard oil in question was adulterated. It is admitted that it is the practice of the applicant and other native manufacturers in Calcutta to adulterate the mustard oil they manufacture not only with *til* oil, but with other adulterants, such as *surguja*, ground nuts, and poppy seed. The defence is,—

(i) that this is necessary for the purpose of expressing all the oil from the mustard seed ;

(ii) that the product is what is commercially known as mustard oil ; and

(iii) that the adulteration is not to the prejudice of the purchaser.

The first of these pleas is manifestly untrue. It is proved in this case that both at the Alipore Jail, where the oil is expressed by hand-labour and in Messrs. Andrew Yule & Co.'s oil-mill at Howrah, where machinery is used for the purpose, mustard oil is manufactured without the use of any hard seed to assist in expressing the oil. The evidence on this point adduced on behalf of the accused is, as found by the Magistrate, entirely unreliable. One witness, Hem Chunder Bose, who has worked a steam oil-mill for seven or eight years, says :—"Mustard alone will not give any oil"—a most palpable falsehood. Then, as the Magistrate points out,—“if the millers say that they want some hard seed to stiffen the mustard, the *til*, which is the softest of all adulterants,

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is the least desirable, yet it is the most largely used. The only reason is that it gives relatively more oil, and the millers want to save expense and increase profits."

The next point is whether the adulterated oil is what is commercially known as mustard oil. This the defence also entirely fails to prove. The witnesses who appear for the defence are many of them persons interested in mills who have a motive for supporting the defence in this contention. There is no evidence to the effect that what the public want and expect to get when they ask for mustard oil is the adulterated oil which the accused and other native manufacturers sell. The Food Inspector in this case asked for mustard oil and had a right to get it. On the other hand, Mr. Gibson of the Howrah Mills has stated that "the pure quality is the commercial mustard oil," and the seventh witness for the defence, an owner of two mills, says "that mustard oil is the pure quality." This seems to us to be beyond all doubt the truth. As the Magistrate says,—“Mustard oil, ghee, milk, etc., have a certain signification, and when a person demands that article, he has a right to be supplied with that article and nothing else.” If, when a purchaser asked for mustard oil, he were to be given adulterated mustard oil, and this were held to be no offence under the Municipal Act, then the adulteration would increase in quantity. Any adulterant might be used and the quantity would be increased, so that soon in mustard oil so-called, the mustard oil would be conspicuous, if not for its entire absence, yet for its presence in only a very small degree.

The third plea raised for the defence is that the purchaser is not prejudiced by the adulteration. But in our opinion he must be prejudiced. Mustard oil is used for cooking purposes and for external application. If it is adulterated, it becomes less suitable for these purposes. The more it is adulterated, the less it possesses the qualities for which it is purchased. Then the use of the adulterants is clearly for the purpose of increasing the bulk of the oil and the profit of the manufacturer. This must be to the prejudice of the purchaser, particularly when, as in this case, he is charged the same price as he would have had to pay for pure mustard oil.

The case of *Baishtab Charan Das v. Upendra Nath Mitra* (1) has been cited. In that case there was no evidence produced to rebut the evidence adduced by the defence to the effect that what is commercially known as mustard oil is the adulterated oil. In this case such evidence has been produced and has been relied on by the lower Court with manifest propriety.

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CALCUTTA.

For these reasons we discharge the Rule.

D. S.

*Rule discharged.*

(1) (1898) 3 C. W. N. 66.

## ORIGINAL CIVIL.

HARIDAS KHANDELWAL

v.

KALUMULL.\*

1908  
May 1.

*Contract—Breach of Contract—Resale, right of—Contract Act (IX of 1872)  
s. 107—Inferiority in quality—Right to reject—Proprietary right, exercise of—  
Damages.*

Unless there is something in the contract to the contrary, a buyer cannot be compelled to take goods with an allowance for inferiority in quality. But if the right to reject the goods as being of an inferior quality is not exercised by the defendant when the goods are tendered, but a right of a proprietary character in respect of the goods is exercised by directing delivery to be made to third parties, then the defendant accepts the goods; and if they remain in the possession of the plaintiff, then he has a lien upon them, and he is entitled, under s. 107 of the Contract Act, to resell the goods and recover as damages the difference between the contract price and the price at the resale.

### ORIGINAL SUIT.

The plaintiff instituted this suit in the Court of Small Causes, Calcutta, for the recovery of Rs. 2,021 as damages and costs by reason of the defendant's failure to take delivery of 50 chests of

\* Small Cause Court Transfer Suit No. 16 of 1902.

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shellac, T. N. mark (in a diamond), of the average standard quality, under a contract, dated the 14th November 1901. The price was Rs. 75 per bazar maund, and delivery was to be given from the godowns of the plaintiff's broker in January and February 1902. One of the terms of the contract was that "should the shellac be inferior in quality, it is to be taken with an allowance to be settled by the undersigned," and it was further provided that "all disputes on the contract to be settled by the undersigned, whose decision shall be final and binding on both parties." The contract was signed by "A. M. John, broker." On the application of the defendant, the suit was transferred to this Court.

The defence put forward was that the defendant rightly rejected the goods on the ground that the goods were not of the quality and condition contracted for. The goods were tendered by the plaintiffs through their broker to the defendant's *gomasta* in Calcutta, who took no steps for inspecting the goods or testing their quality, but by an endorsement on a delivery order directed the plaintiff's broker to deliver the goods in question to K. G. Banerjee & Co., who caused a sample of the goods to be drawn, and requested the plaintiff's broker to make an allowance of Re. 1-8 per bazar maund, but the broker, through A. C. John, an assistant, offered an allowance of 8 annas per maund. Thereafter K. G. Banerjee & Co., by a similar endorsement, directed the broker to deliver the goods to the firm of Becker, Ross & Co., who caused a sample to be drawn of the shellac, and, alleging that the goods were not of the contract quality, rejected them. Then, for the first time by a letter dated the 21st March 1902, the defendant rejected the goods and called upon the plaintiff to make a fresh tender within 24 hours. The goods were all this time lying in the godowns of the plaintiff's broker.

The plaintiff, however, claimed the right of reselling the goods and, after due notice by letter, re-sold them on the 1st of April 1902, at Rs. 57 per maund.

*Mr. A. Chaudhuri* for the plaintiff. Under the terms of the contract, the defendant was bound to take delivery of the goods, and he could claim an allowance for any inferiority in quality, which allowance was to be settled by the broker. He did not do

so: he exercised the right of proprietorship over the goods by ordering delivery to be given to K. G. Banerjee & Co. who, in their turn, endorsed over the delivery order to Becker, Ross & Co., neither of whom are entitled to claim any allowance from the plaintiff. At the instance of K. G. Banerjee & Co. the plaintiff's broker did settle the allowance at 8 annas per maund, and even then the defendant refused to accept.

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*Mr. Sinha* (*Mr. H. D. Bose* with him) for the defendant. The goods not being of the average standard quality, the defendant was not bound to accept them: ss. 113, 117, and 118 of the Contract Act. No case has been made in the plaint that the defendant exercised any right of proprietorship over the goods. If it be conceded that the defendant was, under the terms of the contract, bound to accept the goods with an allowance for inferiority, such allowance was to have been settled by the broker, A. M. John, whose name appears in the contract, and not by his assistant. An arbitrator cannot delegate his authority: see Russell on Arbitration, 8th Edition, p. 148.

**SALE, J.** This was a suit which was instituted in the Small Cause Court, and subsequently transferred to this Court for recovery of damages by reason of the defendant failing to take delivery of 50 chests of shellac.

The defence set up in the affidavit of the defendant, which, under the order of this Court, must be regarded as the written statement in the suit, was that the defendant rightly rejected the goods on the ground that in quality and condition they were not of the character which the plaintiff had contracted to deliver to the defendant.

The goods, which were the subject-matter of the suit, were described in the contract as 50 chests of shellac, T. N. mark (in a diamond), of the average standard quality. The price was Rs. 75 per bazar maund, and delivery was to be given from the godowns of the plaintiff's broker in January and February 1902, the terms being cash on delivery. The date of the contract is the 14th November 1901.

The goods were tendered by the plaintiff through his broker to the defendant on the 18th February. It appears that

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the defendant, who was carrying on business in Calcutta through his gomasta, Giridhari Lall Chobay, took no steps for the purpose of inspecting the goods, or testing the quality of them, but on or about the 25th February, by an endorsement on a delivery order, directed the plaintiff's broker to deliver the goods in question to the firm of K. G. Banerjee & Co. It appears that the defendant was under a contract to deliver shellac to the firm of K. G. Banerjee & Co., and accordingly the defendant, under the terms of his contract with K. G. Banerjee & Co., tendered the goods in suit to that firm in performance of his contract with them. On the 10th or 11th March 1902, Messrs. K. G. Banerjee & Co. caused a sample of the goods to be drawn and requested the plaintiff's broker to make an allowance of Re. 1-8 per bazar maund; the goods were at the time in the godowns of the broker. The broker offered only an allowance of 8 annas, and in the result K. G. Banerjee & Co., by a similar endorsement, directed the broker to make over delivery of the goods to the firm of Becker, Ross & Co. K. G. Banerjee & Co. were under a contract at the time to deliver shellac, T. N. mark, to Messrs. Becker, Ross & Co. Similarly, Becker, Ross & Co. caused a sample to be drawn of the shellac, and, alleging that the goods were not up to contract quality, rejected them. The defendant thereupon, for the first time, on the 21st March rejected the goods and called upon the plaintiff to make a fresh tender within 24 hours. The plaintiff, however, claimed the right of reselling the goods in question as against the defendant, and after due notice by letter the goods were resold on the 1st April at the price of Rs. 57 per bazar maund, and the plaintiff now claims to recover from the defendant as damages the difference between the contract price of the goods and the price of the goods obtained on the resale.

Now it may be conceded that if the goods tendered under the contract in suit to the defendant were not of the contract quality, the defendant had the option to reject the goods subject of course to the special provisions of the contract; and unless there was something in the contract to the contrary I take it the buyer could not be compelled to take the goods with an allowance for inferiority in quality. In the present contract, however, there is a provision that the buyer in case of inferiority is to take the

goods subject to an allowance to be fixed by the broker. There is a further provision that all disputes in respect of the contract are to be finally determined by the brokers. Having regard to these provisions in the contract, the question might undoubtedly have arisen whether the defendant was not bound to take the goods if they were not of the contract quality with an allowance to be fixed by the broker. The question in the present case, however, is not dependent, I think, upon any suggestion as to inferiority in quality of the goods tendered under the contract. It appears to me upon the facts admitted in the affidavit of Giridhari Lall Chobay, which is the defendant's written statement in the suit, that the right, if any, to reject the goods as being of an inferior quality was not exercised by the defendant when the goods were tendered. On the contrary, the defendant by directing delivery of the goods to be given to K. G. Banerjee & Co. exercised a right of a proprietary character in respect of the goods. Moreover, the action of K. G. Banerjee & Co. in directing delivery of the same goods to Becker, Ross & Co. under their contract with that firm exercised a proprietary right of a still more unequivocal character, because in this case delivery was directed after a sample of the goods had been drawn and the quality thus tested. It appears to me then that these acts are evidence of an acceptance of the goods, and inasmuch as the goods remained in the possession of the plaintiff through his brokers, the plaintiff had a lien on the goods for the purchase-money which entitled them to resell the goods under section 107 of the Contract Act. It has been proved that the right to resell was exercised by the plaintiff after due notice given to the defendant, and I think that the plaintiff was justified in exercising that right.

Under these circumstances it is not necessary that I should make a final and formal adjudication as to the quality of the goods, though, I think, under all the circumstances that the truth as regards the quality of the goods is to be found in the evidence of Mr. A. C. John, who was called on the part of the plaintiff, who says that the inferiority was such as might be compensated by an allowance of 8 annas per bazar maund. I think the

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evidence on the other side as regards the excessive inferiority of the goods, especially the evidence of Hem Chunder Bose, is very much exaggerated. However, the question in the case does not depend on the question of inferiority. The plaintiff being entitled to exercise the right of resale, he is entitled to recover from the defendant as damages the difference between the contract price of the goods and the price obtained upon the resale.

There will therefore be a decree for the amount so calculated as damages. Costs on scale No. 2 and interest on decree at six per cent.

*Judgment for the plaintiff.*

Attorneys for the plaintiff: *Manuel and Agarwalla.*

Attorney for the defendant: *C. C. Bose.*

S. C. B.

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## APPELLATE CIVIL.

SHABIUDDIN

v.

DEOMOORAT KOER.\*

1903

May 6, 11.

*Cross-objection—Civil Procedure Code (Act XIV of 1882) s. 561—Cross-objection against co-respondents—Limitation Act (XV of 1877) s. 5.*

X brought a suit against A, B, C, D, E and others to recover a sum of money and to enforce a security bond given by E. The suit was decreed against E alone. On appeal by E, X preferred a cross-objection under s. 561 of the Civil Procedure Code against A, B, C and D, without giving them notice :—

*Held*, that there was nothing in the suit which could be taken as an exception to the general rule that the right of a respondent to urge cross-objections under s. 561 of the Code should be limited to his urging them against the appellant only.

*Anwar Jan Bibee v. Azmut Ali*(1) and *Bishun Churn Roy Chowdhry v. Jogendra Nath Roy*(2) followed; *Upendra Lal Mukerjee v. Girindra Nath Mukerjee*(3) referred to.

APPEAL by Shah Shabiuddin, the defendant No. 5, and Cross-objection by the plaintiff.

The plaintiff, Musammat Deomoorat Koer, instituted a suit against Musammat Boodho, the defendant No. 1, her children, the defendants Nos. 2, 3 and 4, Shah Shabiuddin, the defendant No. 5, and defendants Nos. 6 and 7, to recover Rs. 5,320 and to enforce a security bond given by the defendant No. 5, dated the 26th August 1895. The defendants Nos. 6 and 7 were ticcadars of defendants Nos. 1 to 4.

The Subordinate Judge decreed the suit against the defendant No. 5 alone, except with regard to a small sum of Rs. 300 and odd, which was decreed against defendant No. 6.

\* Appeal from Original Decree No. 7 of 1901, and Cross-objection against the decree of Abdul Bari, Subordinate Judge of Patna, dated Sept. 11, 1900.

(1) (1871) 15 W. R. 26.

(2) (1898) I. L. R. 26 Calc. 114.

(3) (1898) I. L. R. 25 Calc. 565.

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The defendant No. 5 preferred this appeal on the 8th of January 1901, notice of which was served on the plaintiff on the 5th March 1901; and the plaintiff preferred a cross-objection under s. 561 of the Code against the defendants Nos. 1 to 4, on the 10th of April 1901.

The plaintiff in her cross-objection impeached the correctness of the judgment of the Subordinate Judge on his finding that the suit was barred by limitation against the defendants Nos. 1 to 4.

Babu Unakali Mukerjee (*Maulvi Mahomed Yusuff* and *Babu Surendra Nath Roy* with him), for the plaintiff-respondent, raised cross-objections under s. 561 of the Civil Procedure Code against four of the respondents (defendants Nos. 1 to 4), and in support of his contention cited the following cases:—*Bishun Churn Roy Chowdhry v. Jogendra Nath Roy*(1), *Timmayya Mada v. Lakshmana Bhakta*(2), *Moneerooddeen Mojoomdar v. Parbutty Churn Ghose*(3), and *Caspersz v. Kishori Lal Roy Chowdhry*(4).

Maulvi Serajul Islam (*Maulvi Swagul Ali* with him), for the defendants-respondents Nos. 1 to 4, contended that no cross-objections could be raised by a respondent against his co-respondents and cited the following cases: *Muhboob Ali v. Zur Banoo Bibee* (5), *Bishun Churn Roy Chowdhry v. Jogendra Nath Roy*(6), *Sharoda Soonduree Debee v. Gobind Monee*(7). And that inasmuch as the cross-objections were not filed within the time allowed under s. 561 of the Code, they could not now be received. The Court has no discretion under s. 5 of the Limitation Act to extend the time for filing a memorandum of cross-objections: *Degamber Mozumdar v. Kallynath Roy*(8), *Rughu Nath Singh Manku v. Pareshram Mahata*(9), and *Sulleman Ebrahimji v. Joosub Jan Mahomed*(10) referred to.

GHOSE AND PRATT, JJ. (Having disposed of the appeal of the defendant No. 5, their Lordships continued:—) We come to

(1) (1898) I. L. R. 26 Calc. 114.

(2) (1883) I. L. R. 7 Mad. 215.

(3) (1871) 15 W. R. 121.

(4) (1896) 1 C. W. N. 12.

(5) (1868) 9 W. R. 78.

(6) (1898) I. L. R. 26 Calc. 141.

(7) (1875) 24 W. R. 179.

(8) (1881) I. L. R. 7 Calc. 654.

(9) (1882) I. L. R. 9 Calc. 635.

(10) (1890) I. L. R. 14 Bom. 111.

notice a cross-objection which has been preferred by the plaintiff-respondent under section 561, Civil Procedure Code, on the 10th April 1901. We ought here to mention that the Subordinate Judge was of opinion that the claim of the plaintiff as against the defendants Nos. 1 to 4 was barred by the law of limitation, and the cross-objection preferred by the plaintiff seeks to impeach the correctness of the judgment of the Subordinate Judge on this head. The decree of the Subordinate Judge in this case was pronounced on the 11th September 1900. The appeal of the defendant No. 5, which is the appeal with which we are mainly concerned, was preferred on the 8th of January 1901. The notice of this appeal was served upon the plaintiff on the 5th March 1901, but the cross-objection was not put in until the 10th April 1901, that is to say, more than one month after the date when notice of the appeal was served on the plaintiffs, and thus the cross-objection is really out of time, having regard to the provisions of section 561 of the Code. But beyond this, if it was the intention of the plaintiff to obtain any relief as against the defendants Nos. 1 to 4 in spite of the judgment of the Subordinate Judge, it was her duty to serve the said cross-objection upon the said defendants, but this was not done. It will further be observed that the cross-objection is sought to be pressed not against the appellant (defendant No. 5), but against the plaintiffs co-respondents, the defendants Nos. 1 to 4, and it has been argued on behalf of the plaintiff that she is entitled to press it because the wording of section 561 is very general so as to admit of a cross-objection being pressed not only against the appellant, but also against a co-respondent. We are, however, unable to accept that view as correct. This question seems to have been considered many a time in this Court under the old Civil Procedure Code, as also under the new Civil Procedure Code. In the case of *Anwar Jan Bibee v. Azmat Ali*(1), in which the facts were very similar to those with which we are concerned in the present case, the learned Judges, in disallowing the cross-objection that was presented by one of the respondents, observed as follows: "It has been held in a long series of decisions that the cross-appeal cannot reopen any questions which have been decided between the co-respondents, but must have reference to the appellant and the

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(1) (1871) 15 W. R. 26.

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points which are in dispute between the respondent who takes the cross-appeal and the appellant. It is quite possible that there may be cases in which, when an appellant succeeds in his appeal, questions will be opened up as between the co-respondents which would otherwise have been decided; and it is also possible when interests are identical that a respondent succeeding in his cross-appeal may open up questions as between himself and his co-respondent. But that is not the case in this litigation." The same view was adopted in a comparatively recent case under the Code of 1882, and that is the case of *Bishun Churn Roy Chowdhry v. Jogendra Nath Roy*(1). The learned Judges in that case, after referring to various cases on the point, made the following observations:—"As a general rule the right of a respondent to urge cross-objections should be limited to his urging them against the appellants; and it is only by way of exception to this general rule that one respondent may urge cross-objections as against the other respondents, the exception holding good (we do not attempt to lay down any definite exhaustive rule on the point) among other cases in those in which the appeal of some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents. One instance of this kind is to be found in cases of the class considered in *Upendra Lal Mukerjee v. Girindra Nath Mukerjee* (2) (which, we might here mention, was a case of contribution). The view we take is in accordance with that taken in the case of *Anwar Jan Bibee v. Azmut Ali*(3)," to which we have already referred. Is there anything in this case which may be taken as an exception to the general rule that the right of a respondent to urge cross-objections should be limited to his urging them against the appellants, and could it be said that the appeal preferred by the defendant No. 5 opens out questions which cannot be disposed of completely without the matters decided against the plaintiff by the Court below being opened up as between the plaintiff on one hand and the defendants Nos. 1 to 4 on the other? We think not. For these considerations, we are unable to give any effect to the cross-objection that was preferred out of time by the plaintiff-respondent.

(1) (1898) I. L. R. 26 Calc. 114.

(2) (1898) I. L. R. 25 Calc. 565.

(3) (1871) 15 W. R. 26.

The learned vakils for the plaintiff-respondent, however, have presented a petition to us, asking permission to file an appeal against the decree of the Subordinate Judge in this case so far as that decree disallows her claim as against the defendants Nos. 1 to 4; and they have urged that, having regard to the fact that the real plaintiffs are minors and that they were advised that it was not necessary to prefer an appeal against the decree of the Subordinate Judge, but that it would serve all purposes if a cross-objection were directed against the defendants Nos. 1 to 4, we should now receive the appeal, though considerably beyond time. We have considered this matter carefully, but we are bound to say that we do not see our way to grant such a prayer of the respondent. No doubt section 5 of the Limitation Act (XV of 1877) does not give any illustration as to what may or may not be a sufficient cause for extending the time of limitation, within which a suit or an appeal ought to be preferred, but is there really anything in the circumstances of this case which would justify us in relaxing the rule of limitation and in holding that there was sufficient cause within the meaning of section 5 for the plaintiff-respondent not preferring her appeal against the decree of the Court below within such a long time as has elapsed between the 11th September 1900 and the present date? We might here mention that this application to prefer an appeal against the decree of the Subordinate Judge was not thought of until the arguments in the case had been practically closed. The learned vakils for the plaintiff-respondent have been throughout urging upon us that we should treat the cross-objections preferred on the 10th April 1901 as objections which could rightly be preferred not only against the appellant, but also against the defendants Nos. 1 to 4, and it was not until the arguments came to a close that a petition was presented to us asking that the plaintiff should be allowed now to file an appeal, though so much out of time, against the decree of the Subordinate Judge. We accordingly refuse this application. The petition of appeal with the annexures which were placed before us will be returned.

We observe that the petition of appeal is engrossed on a stamp of Rs. 295. That clearly is due to a misapprehension of what fell from the Court the other day at the close of the arguments in this appeal.

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The result is that the appeal is decreed and the cross-objection disallowed. The appellant is entitled to recover his costs of this Court as well as that of the Lower Court from the plaintiff-respondent.

Appeal allowed. Cross-objection dismissed.

R. G. M.

FULL BENCH.

1903
 Feb. 13.

RADHA NATH SINGH
 v.
 CHANDI CHARAN SINGH.*

*"Decree," meaning of—Civil Procedure Code (Act XIV of 1882) ss. 2, 211—
 Mesne profits—Future mesne profits.*

Held, by the Full Bench (Prinsep J. dissenting) that an order dismissing, for default, an appeal from a decree is a 'decree' within the meaning of section 2 of the Code of Civil Procedure.

Jagarnath Singh v. Budhan(1) and *Anwar Ali v. Jaffer Ali*(2) overruled.

Ramchandra Pandurang Naik v. Madhav Purushottam Naik(3) referred to.

REFERENCE to Full Bench in appeal by the judgment-debtor, Radha Nath Singh.

The decree-holder, Chandi Charan Singh, obtained a decree for recovery of possession of certain properties on declaration of title. The decree awarded mesne profits up to the date of the suit, and further directed that "the amount of *wasilat* will be determined at the stage of execution," referring evidently to future mesne profits. This decree was passed on the 31st March 1895, and there was an appeal to the High Court, which was dismissed for default on the 24th November 1897.

Full Bench: Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Prinsep, Mr. Justice Sale, Mr. Justice Stevens, and Mr. Justice Geidt.

* Full Bench Reference in appeal from order No. 282 of 1900.

(1) (1895) I. L. R. 23 Calc. 115.

(2) (1896) I. L. R. 23 Calc. 827.

(3) (1891) I. L. R. 16 Bom. 23.

On the 3rd October 1899, the decree-holder applied for ascertainment of mesne profits, on taking accounts, for the years 1301 to 1307 B.S. On the 17th February 1900, the judgment-debtor put in a petition of objection, contending, amongst other things, that the decree-holder could not get any mesne profits, specially as there was no prayer in the plaint for mesne profits from the date of the suit to the date of the recovery of possession, and there was no order passed by the Court with reference to the same.

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The Subordinate Judge held that the decree had provided for future mesne profits. With reference to other objections by the judgment-debtor, he held that the decree-holder was entitled to mesne profits for a period ending with three years from the date of the High Court decree, although the appeal to the High Court had been dismissed for default, distinguishing the case of *Anwar Ali v. Jaffer Ali*(1) on the ground that the meaning of the word 'decree' with reference to s. 211 of the Civil Procedure Code was not considered in that case. He accordingly disallowed the objections of the judgment-debtor.

The appeal originally came on for hearing before a Division Bench (MACLEAN C. J. and BANERJEE J.). Their Lordships being unable to agree with the view expressed in *Jagarnath Singh v. Budhan*(2) and *Anwar Ali v. Jaffer Ali*(1) referred the case to a Full Bench, on the 11th December 1901, with the following opinions:—

MACLEAN C. J. Three points are raised before us upon this appeal. The first was that, inasmuch as there was no provision in the decree for the payment of mesne profits from the date of the institution of the suit until the delivery of possession, the party in whose favour the decree was made—the respondent on the present appeal—was not entitled to such mesne profits. That depends upon whether, having regard to the provisions of section 211 of the Code of Civil Procedure, there was any provision in the decree for the payment of subsequent mesne profits. Now that we have seen the preliminary decree, it has been conceded by the pleader for the appellant that there is such a provision, and consequently it is unnecessary for us to say anything further upon that point.

The second question is that the respondent is only entitled to mesne profits for a period of three years from the date of the first decree passed on the 31st of March 1895, and not from the date of the decree on the appeal to this Court, dated the 24th of November 1897.

(1) (1896) I. L. R. 23 Calc. 827.

(2) (1895) I. L. R. 23 Calc. 116.

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The latter decree is one of this Court, and is in these terms:—"Upon this appeal being called on in a Division Court before the Hon'ble James O'Kinealy and the Hon'ble Robert Fulton Rampini, two of the Judges of this Court, on the twenty fourth day of November 1897, and the pleader for the appellant not being prepared to go on with the appeal,—It is ordered and decreed that this appeal be, and the same is hereby, dismissed; and it is further ordered and decreed that the appellant do pay to the respondent, who appeared, the sum of Rupees three hundred and one Annas six and Pies six, being the amount of costs incurred by him in this Court with interest thereon at the rate of six per cent. per annum from this date to the date of realisation."

The respondent contends that upon the principle enunciated in the Privy Council case of *Bhup Indar Bahadur Singh v. Bijai Bahadur Singh*(1) the three years runs, not from the date of the decree in the Lower Court, but from the date of the decree of this Court, and, subject to the point I am about to mention in a moment, that has been conceded by the learned Vakil for the appellant. I think it is difficult upon principle to differentiate that case from the case now before us.

The last point is that that which I have previously spoken of as the decree of the 24th November 1897 is not a decree within the meaning of section 2 of the Code of Civil Procedure, upon the ground that it was not passed after argument and after a judgment, but merely upon a default, *viz.*, the non-appearance of the appellant. It is urged that a decree made under the circumstances is not a "formal expression of an adjudication upon any right claimed," within the meaning of section 2 of the Code, and in support of that proposition reliance is placed upon two cases decided by two Division Benches of this Court, *viz.*, *Jagarnath Singh v. Budhan*(2) and *Anwar Ali v. Jaffer Ali*(3). There is no question but that the adjudication here did decide the appeal. These cases undoubtedly support the contention of the appellant, but I may point out that that view is not shared by the Bombay High Court, as appears from the case of *Ramchandra Pandurang Naik v. Madhav Purushottam Naik*(4).

Speaking with every respect, I am unable to share the view of the learned Judges who decided the cases I have referred to in this Court. Looking at the terms of the decree in the present case, I find it difficult to say that there was no formal expression of an adjudication of the right claimed or that such adjudication did not decide the appeal. It does not seem to me to be any the less a "formal expression of an adjudication upon the right claimed," because it was not preceded by an argument or by a judgment, written or otherwise. The decree speaks for itself; it is surely the expression of an adjudication, and it certainly is formal, and it decided the appeal.

On these short grounds, being unable, as I have said, to agree with the decisions of this Court, the case must be referred to a Full Bench upon this point, it being now conceded that there are no other points in the case.

BANERJEE J. I concur.

(1) (1900) I. L. R. 23 All. 152;

L. R. 27 I. A. 209.

(2) (1895) I. L. R. 23 Cal. 115.

(3) (1896) I. L. R. 23 Cal. 827.

(4) (1891) I. L. R. 16 Bom. 23.

On this reference :—

Babu Tarak Chandra Chakravarti for the appellant. The order of the High Court does not come within the definition of a decree in section 2 of the Civil Procedure Code. The word "decree" has the same meaning in ss. 2 and 211 of the Code. It is an order. I rely on *Jagarnath Singh v. Budhan*(1) and *Anwar Ali v. Jaffer Ali*(2). The dismissal of a suit under s. 102 of the Code is analogous, and the following cases relating thereto should be considered: *Anrifo Lal Mukherjee v. Ram Chandra Roy*(3), *Mansab Ali v. Nihal Chand*(4), *Chand Kour v. Partab Singh*(5), and *Gilkinson v. Subramania Ayyar*(6). I refer also to *Lucky Churn Chowdhry v. Budurrunnissa* (7) and *Abdul Hossein v. Kasi Sahu*(8). The opinion of a single Judge in *Ramchandra Pandurang Naik v. Madhav Purushottam Naik* (9) is, I respectfully submit, incorrect.

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[MACLEAN C. J. Why should we put a narrow construction upon the language of section 2? What is an *expression of adjudication*?]

There was no adjudication of any substantive right claimed. The Appellate Court could not have affirmed the judgment of the first Court, which was not before it. Section 2 also relates to a *defence*. When orders in such cases have been held to be not *res judicata*, it cannot be said that there is an adjudication.

[STEVENS J. Dismissal of a suit under section 136 of the Code has been held to be a decree, as also dismissal of a suit for insufficient court-fees.]

I beg also to refer to the Full Bench case of *Fatimunnissa v. Deoki Pershad*(10).

Babu Lal Mohan Das (*Dr. Ashutosh Mukherjee* and *Batu Joygopal Ghosh* with him), for the respondent, was not called upon.

(1) (1895) I. L. R. 23 Calc. 115.

(6) (1898) I. L. R. 22 Mad. 221.

(2) (1896) I. L. R. 23 Calc. 827.

(7) (1882) I. L. R. 9 Calc. 627.

(3) (1901) I. L. R. 29 Calc. 60.

(8) (1899) I. L. R. 27 Calc. 362.

(4) (1893) I. L. R. 15 All. 359.

(9) (1891) I. L. R. 16 Bom. 23.

(5) (1888) I. L. R. 16 Calc. 98.

(10) (1896) I. L. R. 24 Calc. 350.

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MACLEAN C.J. In my opinion the view taken by the referring Court upon the point which has been referred is the right one. I have listened with attention to the argument which has been submitted to us by the appellant, but that argument has not satisfied me that that view is incorrect. I was a party to the reference, and I have given my reasons for the conclusion at which I arrived. Other reasons might also be given. So far as I am personally concerned, I only desire to add that I still think that the definition of a decree in section 2 is sufficiently wide to embrace the conclusion of the Court of the 24th November 1897. We ought to be chary in putting such a construction upon that definition as would lead to an injustice, and this would be the result in the present case if we accepted the contention of the appellant.

I notice a slight error in my observations when the matter was previously before the Court. I said that the point was decided "by the Bombay High Court," but, to be more accurate, I should have said "by one of the Judges of the Bombay High Court," in the case (1) to which I referred.

PRINSEP J. In my opinion the order of an Appellate Court dismissing an appeal for default of the appellant is not a decree within the definition of that term as given in the Code of Civil Procedure. I hold that the cases of *Jagarnath Singh v. Budhan* (2) and *Anwar Ali v. Jaffer Ali* (3) were correctly decided. But I think that the present appeal should be dismissed on another ground. Section 211, Code of Civil Procedure, declares that the decree-holder shall be entitled to mesne profits from the institution of the suit until the expiration of three years from the date of the decree. It has been contended that, under the circumstances of the present case, that means the decree of the first Court. It seems to me that, as the case was taken in appeal to a higher tribunal, the judgment of the first Court could not be regarded as final in 'the formal expression of an adjudication upon the right claimed.' The order passed by the Court of first instance was no doubt a decree, but it was open to consideration by the appeal preferred against it, and until the order of the Appellate Court, which might

(1) (1891) I. L. R. 16. Bom. 23.

(2) (1895) I. L. R. 23 Calc. 115.

(3) (1896) I. L. R. 23 Calc. 327.

modify or reverse it, it was not the actual decree in the proceedings. It became the final decree by the order of the Appellate Court on the appeal; and although that order may not itself be a decree within the terms of the definition of a decree in the Code of Civil Procedure, in its effect it declared that the decree of the first Court was the final decree for purpose of limitation as expressed in section 211. The date of the order of the Lower Appellate Court can therefore, in my opinion, be regarded as the date of the decree from which limitation would run. If we were to hold in the strict terms of the law that the date of the decree of the first Court was, under the circumstances, the time from which limitation would run, it might so happen that the judgment-debtor would, by taking his case up in appeal, deter the decree-holder from executing his decree for mesne profits, for it is not likely that the decree-holder would proceed with the execution of such decree when possibly it might be modified, or even set aside, by the Court of Appeal. The appellant having thus deterred the decree-holder from executing his decree might then, as he has done in the present case, choose not to proceed with his appeal, and allow it to be dismissed for default, and if the calculation of limitation be from the date of the decree of the first Court, it would so happen that the decree-holder would be wrongfully deprived of mesne profits to which he would otherwise be entitled if the appeal were heard.

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SALL J. I agree in the view of the referring Court that the order or decree of this Court dismissing for default an appeal from a decree is a 'decree' within the meaning of section 2 of the Code of Civil Procedure. I think that view is not only a possible but a reasonable one, having regard to the language of section 2, and I see no reason whatever for adopting a narrow construction.

STEVENS J. I am also of opinion that the order of the dismissal of the appeal for default amounts to a 'decree' within the definition.

GHOSH J. I agree in the view expressed by My Lord the Chief Justice.

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MACLEAN C. J. The result is that this case will be sent back to the Division Bench which made this reference with the expression of this our opinion.

The respondent is entitled to the costs of this reference.

M. N. R.

APPELLATE CIVIL.

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MAHOMED OBEDUL AZIM ABU AHSAN.*

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Mahomedan Law—Wakf, validity of—Family settlement in perpetuity—Illusory gifts for charitable purposes.

"A *wakfnama* to be valid must be a substantial dedication of property to a religious or charitable purpose."

Where it appeared from the *wakfnama* itself that the substantial object of it was not to devote the settled property to charitable or religious purposes, but, in effect, to give the property in substance to the grantor's family practically in perpetuity, and that the provisions for charitable purposes could scarcely be regarded as other than illusory :—

Held, that the instrument did not create a valid *wakf* according to Mahomedan law.

Mahomed Ahsanulla Chowdhry v. Amar Chand Kundu (1), *Abdul Gafur v. Nizamudin* (2), *Abul Fata Mahomed Ishak v. Rasamaya Durr Chowdhri* (3), and *Mujibunnissa v. Abdur Rahim* (4), referred to.

APPEAL by the defendants, Fazlur Rahim Abu Ahmud and others.

This appeal arose out of an action brought by the plaintiff to recover possession of immoveable properties on declaration of

* Appeal from Original Decree No. 148 of 1899, against the decree of Bipra Dass Chatterjee, Subordinate Judge of Murshidabad, dated Dec. 19, 1898.

(1) (1889) I. L. R. 17 Calc. 498; L. R. 17 I. A. 28.

(2) (1892) I. L. R. 17 Bom. 1; L. R. 19 I. A. 170.

(3) (1894) I. L. R. 22 Calc. 619; L. R. 22 I. A. 76.

(4) (1900) I. L. R. 23 All. 233; L. R. 28 I. A. 15.

title thereto. The allegation of the plaintiff was that his father Hefazatulla Chowdhry died on the 19th Baisak 1303 B.S. (30th April 1896), leaving him surviving the plaintiff, the defendants, and another son who subsequently died, as heirs; that seven-ninths of the properties mentioned in Schedule (Ka) of the plaint Hefazatulla obtained as one of the heirs of his father; that one-fourth share of the properties he obtained by gift from his mother, Bibi Ummat Sofia, and the remaining one-fourth share he obtained as matwali under a *wakfnama* of his brother, dated 4th Falgun 1266 B.S. (16th February 1860); that Hefazatulla Chowdhry executed a *wakfnama* with regard to all the disputed properties mentioned in the plaint on the 3rd Falgun 1286 B.S. (14th February 1880), whereby he himself became the matwali during his lifetime and appointed defendant No. 6 (one of his wives) matwali after his death; that on the death of Hefazatulla Chowdhry defendant No. 6 took possession of these properties as matwali; that the said *wakfnama* of the 3rd Falgun 1286 was never acted upon and was not legally a valid document; that the plaintiff as one of the heirs of his father was entitled to a share of the properties mentioned in the plaint, and hence the suit for possession was brought on declaration that the above-named *wakfnama* did not create any valid *wakf*. The plaintiff also prayed that the *wakfnamas* of the said Bibi Ummat Sofia and Bibi Kayemunnessa his father's sister, under which his father obtained certain properties as matwali to be also not valid in law.

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The material portions of the *wakfnama* dated 3rd Falgun 1286 (14th February 1880) were in the following terms :—

"I, Chowdhury Hefazatulla of Salar, district Murshidabad, by race Mussalman, by occupation zemindar, do execute this *wakfnama* to the following effect:—

Whereas human body is perishable, I, of my own free will, in a sound state of body and mind, without compulsion, and for the sake of spiritual benefit in the next world, make *wakf*, according to the provisions contained in the several paragraphs below, of the rent-free and rent-paying properties obtained under *wakfs*, created by my mother, Bibi Ummat Sofia, and paternal aunt, Bibi Kayem-un-nessa, and under *hida* made by the said mother, and my ancestral and self-acquired properties situated in the districts of Rajshahi, Maldah, Murshidabad, Burdwan and Birbhum and which are in my rightful possession. I, and after my death, my heirs and representatives, shall duly remain as matwali for the above purpose and continue to carry out for ever all the rules and provisions contained in this *wakfnama*. We

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shall on no account be able to act contrary to the said prescribed rules and provisions:—

1. Of the properties belonging to my aforesaid mother, she, on the 4th Falgun 1263, made a *wakf* of the properties which are situate in village Salir for the (maintenance of) musjid erected by Munshi Hefazatulla and Munshi Enayetulla, deceased, and appointed me (as matwali), and my aforesaid paternal aunt made *wakf*, on the 14th Sraban 1280, of her own properties for (maintenance of) the musjid and madrasa, lying on the bank of the Kayemsagore tank, made by her within the said village, and appointed me along with Herasatulla, Keramatulla, Mahiuddin Hosain, and Shah Abdulla as matwalis. On (paying) the Government revenues and collection charges, etc., for both the said *wakf* estates, and defraying the proportionate amount of the expenses as fixed for both the musjid and madrasa with the profits and issues, I, with my aforesaid brothers, am entitled to and in ijmal possession of the *wakf* properties in the way laid down in my mother's *wakfnama* and of the *wakf* properties created by my said paternal aunt as matwalis, and have hitherto been carrying out all the provisions made by the executants of those *wakfnamas*, and shall continue to do so. After my death the rules, etc., relating to the appointment of matwalis laid down in the *wakfnama*, shall take effect with regard to those properties as well as my own properties which I dedicate as *wakf*.

2. Out of the interests and profits that may remain to me as matwali, after defraying the expenses for the acts provided for in the *wakfnamas* of my aforesaid mother and paternal aunt, and besides that, out of the interests and profits that may remain after paying the sudder and mofussil revenue, and rents and collection charges, etc., in connection with the estate which I dedicate as *wakf*, a sum of Rs. 360 should be spent annually for religious and pious purposes, *viz.*, for feeding wayfarers, travellers, faqirs, poor men, and for performing *Fateha Doaz-Daham*, *Fateha Yas-Daham*, *Rajab*, *Romjan Sarif*, *Idh*, *Bakridh*, *Mohurram*, *Sobebarat*, and other festivals.

3. Remaining in rightful possession of the *wakf* properties as matwali during my life, and defraying the expenses for feeding wayfarers, travellers, faqirs, and poor men, and performing the *Fateha Doaz-Daham*, etc., in the way stated in paragraph 2, I shall defray my personal expenses and the maintenance of the family and other expenses from the surplus of the income of this property which I dedicate as *wakf*, and the *wakf* properties of my mother and aunt.

4. After my death, my wife, Bibi Malihat-un-nessa, shall become the matwali of this *wakf* property and of the *wakf* estate created by my mother and aunt aforesaid; and remaining bound by the terms and conditions laid down in the above paragraphs 1 and 2, she shall defray the prescribed expenses, and out of the profits that may remain after paying the Government revenues and the collection charges on the receipts for all the *wakf*-made properties and the costs in connection with suits for protecting rights and interests, and realizing arrears of rents and other expenses, she, the said Bibi, shall get Rs. 150 per month as pay for performing the duties of the matwali from the surplus of the profits.

5. The surplus of the profits that would remain after defraying the aforesaid fixed and defined expenses for religious and charitable purposes and paying the

salary of the said Bibi, shall be received by my three sons now living, viz., Fazal Bahim Abu Ahmud, Fazal Rahim Abul Mustafa, and Zillar Rahim Ali Ahmud, and two daughter, Fazilat-un-nessa Ummat Zohra and Zaherat-un-nessa Ummat Rasul, born of the womb of the said Bibi, each of the sons getting two-third share, and each of the daughters the remaining one-third share according to the Mahomedan Law. Besides the present sons and daughters, if any other sons or daughters be born of my loins in the womb of my said wife, then, in the like manner, the sons shall get two-thirds and the daughters one-third share each. On their death, their heirs shall be entitled to their respective shares so fixed, according to the *shastras*, and the matwali shall give and they take the same.

6. After the death of the said Bibi, her sons, born in her womb, according to seniority, shall be appointed to the said post of matwali, and he shall perform the duties in connection with the *wakf*. If, after the death of the said Bibi, her only son who is matwali be living, then the monthly pay of Rs. 150, hereby fixed and receivable by her for performing the duties in connection with the *wakf*, shall be received in full by him alone; but if more than one son be living, the matwali son shall get a half of that amount, and the other sons, who may be living, shall get the other half in equal portions, and if any son dies leaving son or sons, such son or sons shall get the share of his or their father.

7. The sons born in the womb and the grandsons, etc., of the said Bibi shall successively be the matwalis according to the rules laid down above, and they shall duly perform the duties and acts described above in connection with the Towliat. In case of default of sons, grandsons, etc., and other heirs in the line of the male descendants, which may God forbid, my second wife's son, Mahomed Obedul Azim Abu Ahsan, and after his death, his sons, grandsons, etc., in succession, shall become the matwali and perform the duties and works in connection with the *wakf*, and out of the pay fixed for that post he shall get Rs. 75 only per month, and he shall not, besides that, get any profits of the estate. The remainder of the pay and the profits shall be received by the line of daughters of the sons born in the womb of my wife, the said Bibi matwali, stated in paragraph 5, and on their death, the sons and grandsons, etc., of those daughters shall continue to receive the same, according to the *sharah*.

8. In default of male issues, i.e., sons, grandsons, etc., in the line of the male descendants of my wife, the said Bibi matwali, as described in paragraph 4, and Mahomed Obedul Azim Abu Ahsan, the son by my second wife, and his sons, grandsons, etc., then the daughters' sons, grandsons, etc., of the son born in the womb of the said Bibi, and, on their default, the sons, grandsons, etc., of their daughters and so on, who may be senior in age, as stated above, shall be appointed to the post of matwali of the Towliat, and shall get his pay at the rate fixed in paragraph 6. The remainder of his pay and the amount of profits shall be divided amongst the other heirs, that is, the same shall be divided amongst the class of persons described in paragraph 5.

9. In default of the male issues, i.e., the sons, grandsons, etc., of the daughters born in the womb of my wife, the said Bibi, as stated in paragraph 8, the duties in connection with the Towliat shall be entrusted to the daughters and daughters' daughters who may be living, and they shall continue to get the fixed pay in the

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way stated above. In default of them also the daughters' sons and grandsons of their male issues, or the daughters or daughters' daughters who may be living, first the daughters' sons and grandsons, and in their default, then daughters and daughters' daughters, and in their default any male in the daughters' line of my second wife's son, Mahomed Obedul Azim Abu Ahsan, and in their default, their females shall be entitled to perform the duties in connection with the said Towliat.

10. If none of my sons and daughters be living or none in their line be living, then any male descendants of my nearest kinsman and relative who will be competent (*aktil*) and well qualified (*arsahad*) shall become the matwali and perform the duties of the Towliat. He shall get half of the pay fixed for the matwali, and the remainder of the pay and the whole of the profits of the estates shall be expended for the madrasa, dispensary, charity, and other pious purposes.

11. The matwalis successively, being entitled by right of matwali to the properties *wakf*-made and remaining liable for the Government revenue, and paying the Government revenue payable for the properties, and getting their own names registered in respect of the rent-free and rent-paying properties, both in the sudder and mofussil, and remaining in enjoyment and possession of all the lands with all rights and appurtenances, shall continue to carry out the above terms and conditions. The matwalis shall, when necessary, be able to bring suits in connection with those properties, conduct the same, file answers to the same, and make amicable settlements thereof. None of the matwalis shall ever be able to mortgage these *wakf* properties for his own debts, nor shall be able to make any gift, *kiba*, sale or any other kind of transfer of the same to anybody, and these *wakf* estates shall not be liable to be mortgaged or attached or sold by auction for any personal debts of the matwali; if they do so, the same shall be null and void.

12. During my lifetime I, for the purpose of paying the Government revenue, and for managing this *wakf* estate with advantage, and for making improvements in, and adding to, the *wakf* estate, shall be able to grant any kind of permanent settlement, or to deal with the property in exchange for some other property. After my death the said Bibi or any descendants of her belonging to the line of her eldest son, who may be the matwali for the time being of the *wakf* estate, shall also have the same power according to the rules of the *sharak*.

13. If none in the said family of the sons and daughters born in the womb of my said Bibi, and in the families of the sons and daughters born of the loins of my second wife's son, and, lastly, none of my nearest kinsmen and relatives shall remain alive, which may God forbid, the Government shall take charge of the whole estate connected with the *wakf*, and appoint a fit person to the post of matwali for managing the duties of the same. He shall get a pay of Rs. 75 only per month for performing the said duties, and the rest of the pay and the whole of the income of the estate connected with the heirs shall be expended for the madrasa, dispensary, and other pious purposes, as described in paragraph 2.

14. I have hereby provided that, under the conditions laid down in paragraph 8, I shall remain matwali of the properties connected with the *wakf* during my lifetime; but if I go on pilgrimage or if I become ill, I shall be able to nominate and appoint any person I like as manager to perform and carry on the duties in connection with the *wakf* estate; but if such person proves incompetent, I shall be

able to dismiss him and appoint another fit person in his place, and the future matwalis also shall have the same power."

The defence was that the *wakfnamas* mentioned above were valid documents, and that the plaintiffs could not recover possession of the properties in dispute.

The Court of first instance held that the plaintiff could not get any relief with regard to the *wakfnamas* executed by Bibi Ummat Sofia and Bibi Kayemunnessa, but having held that the *wakfnama* executed by Hefazatulla, dated the 14th February 1880, was not a valid document, decreed the plaintiff's suit in part.

Against this decision the defendants appealed to the High Court; and thereupon the respondent, Mahomed Obedul Azim, also filed a cross-objection under s. 561 of the Code of Civil Procedure.

Moulvi Mahomed Yusoof (*Moulvi Z. R. Zahid* with him) for the appellants. The rule laid down by the Privy Council in regard to the invalidity of a *wakf*, where a major portion of the profit is not devoted to pure charity, must be confined to the case of a creditor. No general rule governing all cases was intended to be laid down, because the application of the major portion to charity is not by the Mahomedan Law the only test: by that law that condition is no test at all; but the case law lays it down as a test and we must submit to the authority, but confine it to the particular case. That the view taken by the Privy Council is not the governing rule is clear, because, even assuming all conformity to the requirements laid down by the Privy Council, if the *wakf*-maker becomes a heretic, his *wakf* becomes a nullity. The Privy Council must therefore be taken to have laid down that all beyond the creditor's case must be governed by Mahomedan Law, by which the theory of *sawab* or future merit is the fundamental and governing principle to be applied in all cases. The Privy Council must be taken to have only laid down that the *wakf* was voidable at the instance of the creditors, and not that it was absolutely void.

In the case of an heir seeking to set aside his father's act, a different principle is involved, viz., that of religious merit: the creditor may not care for it, but the heir is bound to observe

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the principle along with the other principles of Mahomedan Law in regard to a *wakf*.

In the case of an heir, which is not directly decided and therefore not directly governed by the Privy Council decision, I am at liberty to show the real principle which governs the subject.

The law laid down by the Privy Council does not strike at the root of a *wakf*; its existence depends on the theory of *sawab* or religious merit. The test in case of *wakf* is the principle of *sawab* and not the principle of gift. Analogies from the latter could not be borrowed to control a *wakf*. A gift is a (i) transfer without consideration; (ii) in favour of a person. The donee in case of a gift takes absolutely, and no trust by any means could be created by means of gift. But a *wakf* is (i) a transfer for consideration, that being a promise of God in regard to *sawab* or religious merit hereafter; (ii) it is a transfer in favour of God Who holds the property for the purposes enjoined by the deed, if such purposes are calculated to bring *sawab* according to Mahomedan Law. If the *wakf* involves *sawab* as understood by the Mahomedan Law, then God will hold the property for the purposes laid down. If there is no *sawab* initially, there is no *wakf*, even if the major portion of the profit is devoted to charity: if there is *sawab*, even when no portion is devoted to charity as understood in England, the *wakf* is good: if there is *sawab* initially, but it fails afterwards owing to heresy, the *wakf* fails.

Wakf is an institution to reach *sawab* to the owner by rules recognised by Mahomedan Law and by such rules, *sawab* is attained by the prayers of the rich as well as the poor, strangers as well as relations.

In order to make a *wakf* void, the vital or essential condition must be wanting, and that condition is *sawab* or what contributes to it. If a condition affects a non-vital part, the breach of that condition does not render the *wakf* void. The test of the Privy Council rulings does not relate to the essence or vitality of the *wakf*, and therefore the absence of that condition might make it voidable, but not void. As to what is a nullity according to Mahomedan Law, see Mahomed Yusooof's Tagore Law Lectures for the year 1892, Volume III, pages 9, 10, 13.

The heir is not in a position to avoid his father's *wakf* by reason of the defect in the *wakf* being of the nature laid down by the Privy Council. Assuming the *sawab* exists in spite of the breach of this test (and may exist even when this test is fully complied with), the son who derives his title through his father cannot be heard to say that his father should be deprived of *sawab*. The son had no claim on his father's property during the latter's lifetime. In the present case the plaintiff consented to his father's disposition for consideration; and he led his father to believe that he would not question his acts after his death. The son is heir only to such of the property as the father leaves undisposed of. Here there was complete disposal according to Mahomedan Law, and for more than 12 years there was adverse possession in God.

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*Moulvi Serajul Islam* (*Moulvi Abdul Jawad* with him) for the respondents. It has already been settled by a series of decisions that for the validity of a *wakf*, there must be a substantial dedication of the *corpus* of the property endowed to religious and charitable purposes. It is not competent to a Mahomedan to make a valid *wakf* by merely using certain expressions as a cover or veil for some ulterior object other than religious and charitable: see the cases of *Mahomed Ahsanulla v. Amar Chand Kundu*(1), *Mujibunnissa v. Abdur Rahim*(2), and *Abdul Gafur v. Nizamudin* (3).

Whatever may have been the opinion of the old Mahomedan jurists on the subject, it is now settled beyond all controversy that a pure settlement on children by a Mahomedan is not recognized by our Courts of Justice as valid dedication: see the case of *Bikani Mia v. Shuk Lal Poddar*(4) approved by the Privy Council in the case of *Abul Fata Mahomed Ishak v. Rasamaya Dhur Chowdhri*(5).

The contention that such dedications are voidable only at the instance of the creditors is not sound. The transaction evidenced by the so-called *wakfnama* being void *ab initio*, it can

(1) (1889) I. L. R. 17 Calc. 498;  
 L. R. 17 I. A. 28.

(3) (1892) I. L. R. 17 Bom. 1;  
 L. R. 19 I. A. 170.

(2) (1900) I. L. R. 28 All. 283;  
 L. R. 28 I. A. 15.

(4) (1892) I. L. R. 20 Calc. 116.

(5) (1894) I. L. R. 22 Calc. 619; L. R. 22 I. A. 76.

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be questioned by the creditors as well as by the heirs of the donor: see the case of *Mujibunnissa v. Abdur Rahim*(1) and also the unreported decisions in appeals from original decrees Nos. 216 of 1898 and 26 of 1899. In the unreported decisions it was also held that a son is not estopped from disputing the validity of the *wakf* created by his father or other ancestor.

The Privy Council in dealing with the case of *Abul Fata Mahomed Ishak v. Rasamaya Dhur Chowdhri*(2) does not rest their decision on any consideration of the question that the objectors to the *wakfnama* were creditors.

As to the point of limitation, the cause of action to the plaintiff accrued after the death of the donor. The plaintiff had no right to maintain a suit for the declaration of the invalidity of the document during the lifetime of his father.

The so-called deed of endowment being a nullity, it was not necessary for the plaintiff to bring a suit to have it set aside. Article 91 of the Indian Limitation Act has no application to the case.

*Moulvi Mahomed Yussof* in reply.

**MACLEAY C.J.** This is a suit the object of which is to have certain *wakfnamas*, which are mentioned in the plaint, declared to be invalid as against the present plaintiff, and to recover possession of his share of the property comprised therein. I will first deal with the *wakfnama* executed by the plaintiff's father, and dated the 14th of February 1880. A minor question has been raised on cross-objection as to the validity of a *wakf* deed dated the 15th of February 1860, which was created by the mother of the plaintiff's father. I will deal with that later on.

The *wakfnama* which it is now sought to set aside is, as I have stated, dated the 14th February 1880, and the grantor, the father of the present plaintiff, died on the 30th of April 1896, leaving a widow and several sons and daughters, some of whom are the present appellants.

The suit was instituted on the 30th of July 1897, and the Subordinate Judge of Murshidabad on the 19th of December

(1) (1900) I. L. R. 23 All. 233; L. R. 28 I. A. 15.

(2) (1894) I. L. R. 22 Calc. 619; L. R. 22 I. A. 76.

1898 held that the *wakfnama* of the 14th of February 1880 was invalid as against the present plaintiff as one of the heirs of the grantor. Under the deed itself, the present plaintiff is excluded from any benefit in the property settled, and he is gravely interested in the question of the validity of the *wakf*, because, if the deed be not valid as against him, he, as one of the heirs of his father, would be entitled to a share of his father's property.

Two or three points have been suggested, rather than argued, by the appellants against the view of the Court below, but practically there are only two which necessitate any real consideration. The first is a question of limitation, and the second and the main one is whether the deed in question is a good and valid *wakfnama*. The minor points, which were not pressed upon us were, *first*, that the plaintiff as heir could not challenge the validity, of the *wakf* deed, and, *secondly*, that he is estopped from raising the present question. In my opinion the plaintiff as heir is entitled to challenge the validity of the *wakfnama*, nor, on the facts, do I see how any question of estoppel arises as against him.

The question of limitation is not, I think, a very difficult one. It is contended for the appellant that the case falls within article 91 of the Second Schedule to the Limitation Act. I will assume that it does. But on that assumption I do not see how the present suit is barred. Under that article, "to cancel or set aside an instrument not otherwise provided for," the period of limitation is three years from the time, when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him." The father died on the 30th April 1896, and the present suit was instituted on the 30th of July 1897, and until the death of the father, the son, as one of his heirs, had no interest in the property settled by the *wakfnama*, nor any right to have it cancelled or set aside. His title as heir did not accrue until the death of his father, which was roughly about a year before the institution of the suit. I therefore cannot see how article 91 bars this suit.

I now pass to the consideration of the question of whether or not the *wakfnama* in dispute is a good and valid deed.

A series of decisions, not only by the Courts of this country but by the Privy Council, has settled the law relating to the

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question of the validity or invalidity of deeds of this description. I only propose to refer to four cases—all decisions of the Privy Council. It has been seriously and earnestly contended before us, on behalf of the appellant, that the view adopted by the Judicial Committee of the Privy Council in these cases is quite at variance with the Mahomedan Law and Mahomedan sentiment in this country. Whether that be so or not is a matter which it is not competent for us to discuss. The decisions of the Judicial Committee are binding upon us, and all we can do is loyally to accept and follow them if they are in point.

In the case of *Mahomed Ahsanulla Chowdhry v. Amar Chand Kundu*(1) the law is thus laid down: "Although the making provision for the grantor's family out of property dedicated to religious or charitable purposes may be consistent with the property being constituted *wakf*, yet in order to render it *wakf* the property must have been substantially, and not merely colourably, dedicated to such purposes." The same view was again held in a later case of *Abdul Gafur v Nizamudin*(2), in which it was held "that a *wakfnama* to be valid must be a substantial dedication of property to a religious or charitable purpose at some time or other." Again, after a long discussion and a careful review of the authorities, the same tribunal held the same view in the case of *Abul Fata Mahomed Ishak v. Rasamaya Dhur Chowdhri*(3), and very recently the Judicial Committee in the case of *Mujibunnissa v. Abdur Rahim*(4) summarised the law by saying: "Their Lordships have, however, considered the question whether, even assuming it to have been registered, the deed is according to its terms a valid deed of *wakf*. It will be so, if the effect of the deed is to give the property in substance to charitable uses. It will not be so, if the effect is to give the property in substance to the testator's family." (I think the word "testator's" must be a slip for "grantor's.")

In this state of the law, we must ascertain from the document itself, whether the effect of the deed is to give the property

(1) (1889) I. L. R. 17 Calc. 498;  
 L. R. 17 I. A. 28.

(3) (1894) I. L. R. 22 Calc. 619;  
 L. R. 22 I. A. 76.

(2) (1892) I. L. R. 17 Bom. 1;  
 L. R. 19 I. A. 170.

(4) (1900) I. L. R. 28 All. 233;  
 L. R. 28 I. A. 15.

in substance to charitable uses or in substance to the grantor's family.

Before I deal with the construction of the deed, I may refer in passing to a very frank admission made in the evidence of one of the principal witnesses for the defendants, which is to be found at pages 100 and 101 of the paper book, as to what the objects of the deed were. He says very frankly: "As regards the object of his creating the *wakf*, I cannot say what was the innermost motive of the Chowdhury Shaheb" (that is, the plaintiff's father); "but I understand that his object was that, instead of the properties being subdivided amongst the heirs, they may remain joint, and that some may remain in the hands of his wife, the matwali, and that the provisions of the *wakfnama* may be carried out. It was also his object that the properties may never be done away with on being sold at auction for the satisfaction of any one's debts." And later on at page 101, he says: "One person is being defrauded; one person of one party is being kept excluded. Such appears to be the case from the *wakfnama*." Pausing therefore a moment, it is reasonably clear that the person so excluded is the plaintiff, who takes no interest under the deed, though, as one of the heirs of the grantor, he would be entitled to a share in the settled property. "But he (the grantor) said to me to this effect: Obedul Azim (that is, the plaintiff) has got the properties of his mother. I have laboured much and expended much money on account of the said property. I have three sons and two daughters by my this wife. If those properties be divided, they shall not have any means to maintain themselves. Consequently, according to the terms of the *wakfnama*, his wife's sons and daughters shall get." I merely refer to this evidence as showing that, in the view of this witness, the object was certainly not charitable purposes. But I rely upon the terms of the deed itself; and looking at the deed, it is almost impossible to say that the substantial object of this deed was to devote the settled property to charitable purposes. No doubt a small annual sum of 360 rupees—30 rupees a month, out of a total annual income of about eight thousand rupees—is devoted to pious purposes, and this, we are told, is about the sum which a Mahomedan gentleman in the position

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of the grantor would, without any *wakfnama*, devote to such purposes. No doubt, in the recitals of the deed there is a statement that "for the sake of spiritual benefit," the grantor makes the deed of *wakf*, and the provisions of the deed are to be "for ever." If we look at the provisions of clause 3, we find that 'the grantor was to remain in possession of the *wakf* properties as matwali during his life,' and under clause 4, the widow is to have 150 rupees a month as matwali for dispensing a monthly charitable sum of 30 rupees only. The surplus profits are devoted to the family practically in perpetuity. Under clause 10, on failure of the direct line of descendants, the male descendant of the grantor's nearest kinsman and relative is to be matwali, and on that contingency, as under clause 13, there is an ultimate gift for charitable purposes. But having regard to the previous limitation and gifts under the deed, the provisions for charitable purposes can scarcely be regarded as other than illusory; see the case of *Abul Fata Mahomed Ishak v. Rasanaya Dhur Chowdhri*(1). Under clause 11 "none of the matwalis shall ever be able to mortgage those *wakf* properties for his own debts, nor shall be able to make any gift, *hiba*, sale or any other kind of transfer of the same to any body, and these *wakf* estates shall not be liable to be mortgaged or attached or sold by auction for any personal debts of the matwali." Clause 12 gives power to grant permanent settlements of the property. Looking at the deed as a whole, I think there can be no reasonable doubt, but that, to quote the language of the Judicial Committee, "the effect of the deed is to give the property not in substance to charitable uses, but in substance to the grantor's family," and that upon this point the Court below was right.

As regards the cross-objection, I have felt some doubt as to whether it is open to the plaintiff, as one of the heirs of his father, who did not dispute the *wakfnama* created by his mother, to maintain the present suit, but it is unnecessary to decide this, for, looking at this deed of *wakfnama* (see p. 114 of the Paper Book) as a whole, I am not disposed to say that on the whole the view taken by the Court below as to the nature of the deed is erroneous. The amount involved is very small, and this cross-objection has not been very seriously urged before us.

(1) (1894) I. L. R. 22 Calc. 619; L. R. 22 I. A. 76.



The result is that the appeal and the cross-objection are both dismissed with proportionate costs.

**GEIDT J.** I concur.

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*Appeal and Cross-objection dismissed.*

## APPELLATE CIVIL.

SUNDER KOER

v.

CHANDISHWAR PROSAD SINGH.\*

1903  
 May 5.

*Leave to appeal to Privy Council—Letters Patent, 1865, cl. 39—"Order made on appeal"—Amendment of decree, application for—Civil Procedure Code (Act XIV of 1882) ss. 206, 595 and 596.*

An order passed by the High Court, rejecting an application under s. 206 of the Civil Procedure Code to amend a certain decree of the Court, is not an order "made on appeal," and is therefore not appealable to His Majesty in Council.

*Soudamenee Dossee v. Maharaj Dheraj Mahatab Chand Bahadoor(1) and Raja Enaet Hossein v. Ranees Rowshan Jahan(2) referred to.*

APPLICATION by Rani Sunder Koer for leave to appeal to His Majesty in Council.

The facts of the case are as follows :—

A consent decree was passed by the High Court, on appeal, in favour of the opposite party, Chandishwar Prosad Narayan Singh, on the 12th September 1884 in a suit originally brought by him against his brother, Raja Rameshwar Prosad Narayan Singh, in the Court of the Subordinate Judge of Gaya. Subsequently on the death of Raja Rameshwar Prosad Narayan Singh, his widow Rani Sunder Koer, made an application to the High Court to amend

\* Application for leave to appeal to His Majesty in Council, No. 8 of 1903.

(1) (1866) 6 W. R. (Misc. R.) 102.

(2) (1868) 10 W. R. (F. B.) 1.

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the said decree, under s. 206 of the Civil Procedure Code, so as to bring it in conformity with the judgment. Thereupon a Rule was issued upon Chandishwar Prosad Narayan Singh to show cause why the application should not be granted. The Rule was heard in due course and ultimately discharged. Against that order the present application for leave to appeal to His Majesty in Council was made.

*Mr. Hill, Dr. Rash Behary Ghose, Babu Karuna Sindhu Mookerjee, and Babu Satis Chunder Ghose* for the petitioner. The question is whether the order, against which leave to appeal to His Majesty in Council is asked for, is an order made on appeal by a High Court within the meaning of section 595 of the Civil Procedure Code. The words "order made on appeal" ought to receive a liberal construction. They mean orders passed in the exercise of appellate jurisdiction. The case of *Girdharee Singh v. Hurday Narain Sahoo*(1) lends support to our contention.

*Mr. O'Kinealy, Babu Golap Chunder Sarkar, Babu Umakali Mookerjee, Babu Saligram Singh, and Babu Surendra Nath Roy* for the opposite party. It is not an order "made on appeal." The words "order made on appeal" cannot mean any order passed in the exercise of appellate jurisdiction: see *Rajah Enact Hossein v. Rance Rowshun Jahan*(2) and *Soudamonee Dossee v. Maharaj Dheraj Mahatab Chand Bahadoor*(3).

*Dr. Rash Behary Ghose* in reply.

**MACLEAN C.J.**—As I was a party to the order against which it is desired to appeal to His Majesty in Council, I should have been glad if I could have seen my way to accede to the present application. But, looking to the terms of clause 39 of the Court's Charter, coupled with sections 595 and 596 of the Code of Civil Procedure, I do not think it is open to us to grant a certificate. The order against which it is sought to appeal was an order made upon an application under section 206 of the Code of Civil Procedure to amend the decree in the suit dated the 12th of September 1884, so as to bring it into conformity with the judgment; and

(1) (1874) 21 W. R. 263, 264.

(2) (1898) 10 W. R. (F. B.) 1.

(3) (1886) 6 W. R. (Misc. R.) 102.

this Court held that the decree, which was a consent decree, as drawn up accurately represented the views and intentions of the compromising parties. That being the nature of the application and of the order, we have to consider whether it was a final decree—the term “decree” includes “order”—passed on appeal by a High Court or any other Court of final appellate jurisdiction. Under clause 39 of the Letters Patent of 1865 an appeal to the Privy Council lies in any matter, “not being of criminal jurisdiction, from any final judgment, decree, or order of the said High Court of Judicature at Fort William in Bengal *made on appeal*.”

The question is whether the order in question is an order made or passed on appeal. The point is not free from judicial authority. It was decided by a Full Bench of this Court, so far back as the 11th of September 1866, in the case of *Soudamonee Dossee v. Maharaj Dheraj Mahatab Chand Bahadoor*(1), that an order rejecting an application to review a judgment passed on appeal is not an order made on appeal from which an appeal lies to the Privy Council under section 39 of the Charter of the High Court. There is a substantial analogy in principle between that case and the present. The same view was practically held in another Full Bench case of *Rajah Enaet Hossein v. Ranee Rowshun Jahan*(2), in which it was held that an order made by the High Court on an application to review its judgment in a case of appeal to the Privy Council previously heard is not an order made on appeal within the terms of clause 39 of the Court's Charter, so as to enable the Court to admit an appeal against such order to His Majesty in Council. In that case Sir Barnes Peacock drew attention to the language used in the Charter—which is practically identical with that in section 595 of the Code—and to the difference between the words “made or passed on appeal” and “made in the exercise of its appellate jurisdiction.” In section 595 of the Code the language used is “passed on appeal” and not “passed in the exercise of its appellate jurisdiction.”

We have been referred to a judgment of this Court of the 12th February 1874 in the case of *Girdharee Singh v. Hurdny Narain Sahoo*(3), in which it was held that “orders made by the

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(1) (1866) 6 W. R. (Misc. R.) 102.

(2) (1868) 10 W. R. (F. B.) 1.

(3) (1874) 21 W. R. 263.

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High Court under section 15 of the High Court's Act are subject to an appeal to His Majesty in Council." But, as Sir Richard Couch pointed out, that point was not necessary for the decision of the particular case then under discussion. The Full Bench cases, however, to which I have referred, and which, in principle, appear to cover the present case, are binding upon us.

But, apart from authority, I should feel a difficulty in saying that the order against which it is now sought to appeal to the Privy Council was an order "passed on appeal by the High Court in its final appellate jurisdiction," and this view gains support from the terms of section 596, which do not appear to me to apply to such a case as the present.

Apart from these considerations, there is a further point, whether the order here was a "final" order within the meaning of sub-section (a) of section 575, but it is unnecessary to go into this.

Upon these grounds I am of opinion that we have no power to grant a certificate.

The application is refused with costs.

**GRANT J.** I concur.

*Certificate refused.*

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Jan. 8.

*Mahomedan Law—Inheritance—Default of sharers—Illegitimacy—"Return"—  
Sunni Sect—Bequest to an heir without consent of other heirs.*

According to Mahomedan Law, in default of other sharers by blood and distant kindred, property left by a man or woman returns to the widow or to the husband.

*Mahomed Arshad Chowdhry v. Sajida Banoo*(1) followed.

Among the Sunni sect illegitimacy is no bar to a person inheriting from his mother and his maternal relations.

*Sahebzaade Begum v. Mirza Himmul Bahadoor*(2) considered; *Koonari Bibi v. Dalim Bibi*(3) followed.

Under the Mahomedan Law, a bequest to an heir is invalid without the consent of the other heirs.

SECOND APPEAL by the defendants, Bibi Bafatun and another.

This appeal arose out of a suit for partition of certain immoveable properties left by one Pir Buksh. The allegation of the plaintiff was that Bibi Bechun died on the 4th October 1897, leaving her husband, Pir Buksh *alias* Piru, as her only heir; that subsequently Pir Buksh died without issue on the 16th October 1897, leaving the plaintiff, his widow, as his only heiress; that she as heiress of the said Pir Buksh, on the 22nd July 1898, obtained Letters of Administration of the estate left by him; that the defendant, on the basis of a will alleged to have been executed by the said Bechun Bibi, on the 29th September 1897, obtained Letters of Administration in respect of the deceased's estate comprised in the will; that if the will alleged to have been executed by Bechun Bibi be genuine, it could only be valid to the extent of one-third share of the estate left by her; that she (the plaintiff) was all along in possession of the said properties and that notwithstanding her repeatedly asking for a partition by metes and bounds, the defendant refused to do so.

\* Appeal from Appellate Decree No. 954 of 1903, against the decree of F. F. Handley, District Judge of 24-Perganas, dated March 2, 1900, affirming the decree of Ram Gopal Chaki, Subordinate Judge of that district, dated Dec. 12, 1899.

(1) (1878) I. L. R. 3 Calc. 702.

(2) (1869) 12 W. R. 512.

(3) (1884) I. L. R. 11 Calc. 14.

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The defence was that the plaintiff was not the legally married wife of Pir Buksh; that the defendant took out probate of the will of Bechun Bibi, and as such he was in possession of the entire estate left by her; and that the suit was not maintainable in the form it was brought. It was found that the plaintiff was the legally married wife of Pir Buksh and the defendant was an illegitimate son of the sister of Bechun Bibi. The Court of first instance having held that inasmuch as the will set up by the defendant could not be valid beyond a third share of the premises devised declared that the plaintiff was entitled to the remaining two-third share by inheritance, being the only heiress of Pir Buksh, and directed a commission to issue to partition the properties. On appeal the District Judge of the 24-Perganas confirmed the decision of the First Court.

*Moulvi Mahomed Yusuff* for the appellant.

*Babu Boidya Nath Dutt* for the respondent.

**BAHARJEE AND GEIDT JJ.** This is a second appeal from a preliminary decree determining the shares of the parties in a partition suit; and the question raised on behalf of the defendants, appellants, is whether the Court of Appeal below has determined the share of the plaintiff correctly under the Mahomedan Law.

At the hearing of the appeal a preliminary objection is raised on behalf of the plaintiff, respondent, that the appeal ought to fail, as the final decree in the partition suit has since been made and has not been appealed against, although the time for appealing has long expired.

We are of opinion that this objection should not prevail. The law allows an appeal from a preliminary decree in a partition suit: see the decision of the Full Bench in the case of *Dulhin Golap Koer v. Radha Dukari Koer*(1).

The appellants are therefore entitled to prefer this second appeal and to ask us to determine the question raised in it, leaving it to the parties to see what the effect of the appellants not having appealed against the final decree in the suit may be. Possibly they may yet appeal against that decree, though out of time, because the law allows a party to prefer an appeal after the time

(1) (1892) I. L. R. 19 Calc. 463.

ordinarily allowed for doing so has expired, if he can satisfy the Appellate Court that there was good and sufficient cause for not preferring it within the time allowed by law.

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Coming now to the merits of the appeal, we find that the Lower Appellate Court has held that the plaintiff, as the surviving widow of Pir Buksh, is entitled to the whole of the estate left by Pir Buksh, and that the estate left by Pir Buksh was  $\frac{2}{3}$  of that left by his wife, Bechun Bibi, the remaining  $\frac{1}{3}$  having been devised by Bechun Bibi by will in favour of her sister's illegitimate son, Tunu; we should rather have said the remaining  $\frac{1}{3}$  being all that could have been validly bequeathed by Bechun in favour of Tunu.

This decision, the learned vakil for the defendant-appellant contends, is erroneous in law, because he argues that under the Mahomedan Law a spouse is not entitled to any return, and that all that Pir Buksh was entitled to was  $\frac{1}{3}$  of  $\frac{2}{3}$  of Bechun Bibi's estate after deducting  $\frac{1}{3}$  as validly bequeathed by her to Tunu; and that the plaintiff as widow of Pir Buksh was entitled only to  $\frac{1}{3}$  of what Pir Buksh inherited, or, in other words, that the plaintiff was entitled only to  $\frac{1}{3}$  of  $\frac{1}{3}$  or  $\frac{1}{9}$  of Bechun Bibi's share, instead of  $\frac{2}{3}$ , which the Court of Appeal below has awarded to her. And in support of this contention he relied upon that portion of the Sirajiyyah which deals with the return, where it is said that, in the absence of residuaries, the surplus amount, after assignment of shares to the sharers, is returned to the sharers according to their respective rights, except the husband or wife, and where there is no other heir the surplus goes to the Public Treasury. But although that was the original rule, an equitable practice has prevailed in modern times of returning to the husband or to the wife in default of other sharers by blood and distant kindred (see Shama Charan Sarkar's *Al Sirajiyyah*, p. 17). And this view has been accepted and followed as correct in the case of *Mahomed Arshad Chowdhry v. Sajida Banoo* (1). That being so, as there is no dispute with regard to the plaintiff being the only heir of Pir Buksh, the whole of Pir Buksh's estate must be held to have passed by inheritance to the plaintiff.

(1) (1878) I. L. R. 3 Calc. 702.

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The question then remains, what was the extent of Pir Buksh's share in Bechun Bibi's estate? It is contended for the appellant that Pir Buksh was not the sole heir of Bechun Bibi, but that her sister's illegitimate son, Tunu, was in the line of heirs, as illegitimacy is, under the Mahomedan Law, no bar to a person inheriting from his mother and his maternal relations. This is so, and it is supported by the authorities cited (see Baillie's Digest of Mahomedan Law, pages 391 and 414). Upon this point the learned Vakil for the respondent contends, upon the authority of the case of *Sahebzadee Begum v. Mirza Himmud Bahadoor*(1), that according to the Shiah Law of Inheritance an illegitimate child does not inherit from his mother or his maternal relations. Now, in the first place, it is not clear how far that case is an authority for the proposition in support of which it is cited. What was held there was that the plaintiff had no right to inherit the estate of his illegitimate brother. But, be that as it may, it is not shown that the parties to this case are Shiahs. It is not even alleged before us in the argument that they are so, and, in the absence of any such allegation, there is a presumption that the parties are Sunnis, to which sect the great majority of the Mahomedans of this country belong, as has been pointed out by Baillie in the Introduction to his Digest of the Imameea Law. That being so, we must hold that Tunu was an heir of Bechun Bibi, and that Pir Buksh was not entitled to more than  $\frac{1}{2}$  by inheritance. This view is in accordance with that taken in the case of *Koonari Bibi v. Dalim Bibi*(2). But, if that is so, it would follow that Tunu could not claim by bequest from Bechun: for, according to Mahomedan Law, a bequest in favour of an heir is invalid without the consent of the other heirs. That being so, the estate left by Bechun vested by inheritance in two persons—her husband Pir Buksh, and her sister's illegitimate son Tunu—the husband being entitled to  $\frac{1}{2}$ . The share of the plaintiff, therefore, will be  $\frac{1}{2}$  of Bechun's estate inherited by her through Pir Buksh.

The decree of the Lower Appellate Court must therefore be modified by reducing the share of the plaintiff from  $\frac{2}{3}$  to  $\frac{1}{2}$ . The parties will be entitled to costs in proportion.

*Decree modified.*

S. C. G.

(1) (1869) 12 W. R. 512.

(2) (1884) I. L. R. 11 Calc. 14.



## AMBICA DAT VYAS

v.

## NITYANUND SINGH.\*

1908

March 6.

*Limitation—Limitation Act (XV of 1877) s. 19, exp. 1, Sch. II, Art. 56—  
Acknowledgment of debt, unstamped—Stamp Act (I of 1879), Sch. I, Art. 1—  
Tankha—Stamp-duty—Evidence of debt.*

The mere fact of a document being an acknowledgment of a debt within the meaning of s. 19 of the Limitation Act, would not make it liable to a stamp-duty under Sch. I, Art. 1 of Act I of 1879. There are other conditions required to be fulfilled, one of which being that it should be intended to supply evidence of a debt.

*Binja Ram v. Rajmohan Roy*(1), *Bishambar Nath v. Nand Kishore*(2), and *Mulji Lala v. Lingu Makaji*(3) referred to.

SECOND APPEAL by the plaintiff, Ambica Dat Vyas.

The suit was for the recovery of the sum of Rs. 1,090-11 from the defendant on account of the costs of printing receipts, etc. It was found by the Court of first instance that the printing work was completed in August 1893, but that the defendant admitted by a writing, dated the 11th June 1896, that a certain sum was due by him on account of the said work and gave a *tankha* or written order to his *tehsildar* to pay the amount to the plaintiff. The said document was addressed to the *tehsildar*. The plaintiff instituted the suit on the 15th October 1898, dating his cause of action from the said 11th June 1896, the date of the *tankha*. The defence was mainly one of limitation.

The Subordinate Judge held that the suit was governed by article 56 of the second schedule to the Limitation Act, and that it was therefore barred by limitation; and that the *tankha* being on an unstamped paper was inadmissible in evidence as an acknowledgment of the debt by the defendant. The suit was accordingly dismissed. On appeal, that decision was affirmed by the District Judge.

\* Appeal from Appellate Decree No. 568 of 1900, against the decree of W. H. Vincent, Officiating District Judge of Bhagalpur, dated Jan. 16, 1900, affirming the decree of Kally Coomar Bose, Subordinate Judge of that district, dated July 22, 1899.

(1) (1881) I. L. R. 8 Calc. 282.

(2) (1892) I. L. R. 15 All. 56.

(3) (1893) I. L. R. 21 Bom. 201.

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SINGH.*Babu Baldeo Narain Singh* for the appellant.*Babu Prasanna Chandra Roy* for the respondent.

**BAHARJEE AND HENDERSON JJ.** In this appeal which arises out of a suit brought by the plaintiff-appellant for the price of work done by him for the defendant, the only question raised for determination is whether the Lower Appellate Court was right in holding that a certain letter of acknowledgment called *tankha* was inadmissible in evidence, as it was not stamped. The suit was brought more than three years after the time the work was done, and it would be barred by Art. 56 of the second schedule to the Limitation Act unless this acknowledgment can be used as evidence, in which case the suit would, under the provisions of section 19 of the Limitation Act, be saved from being barred.

The Court of Appeal below observes with reference to this letter or *tankha*: "It is quite clear that this *tankha* is an acknowledgment of a debt, and it was intended to act as one in my opinion, and was so understood and taken by the plaintiff. It is not stamped, and so cannot be admitted." The provision of the Stamp Act requiring an acknowledgment to be stamped is Art. 1 of Schedule I to Act I of 1879, which governs this case, and which says that "Acknowledgment of a debt exceeding twenty rupees in amount or value, written or signed by or on behalf of a debtor in order to supply evidence of such debt in any book (other than a banker's pass-book) or on a separate piece of paper, when such book or paper is left in the creditor's possession," is required to be stamped with the stamp of one anna. The mere fact of a document being an acknowledgment of a debt would not therefore make it liable to a stamp duty. There are other conditions required to be fulfilled, one of which is a very important one, and that is that it should be written or signed on behalf of a debtor in order to supply evidence of a debt. The question is whether that was the intention of this document. It has not been found by the Lower Appellate Court that such was the case. The Lower Appellate Court takes it for granted that if it is an acknowledgment of a debt, and was intended to be an acknowledgment of a debt, it must be stamped. That view in our opinion is not correct.

The letter after setting out the several items of work done requests the *tehsildar* of the writer to pay the amount to the creditor to whom it is handed. Of course the mere fact of its being addressed not to the creditor will not prevent it from being an acknowledgment under section 19 of the Limitation Act, as Explanation 1 of that section would show. And it does not necessarily follow that it was intended to supply evidence of the debt. The question of limitation is one of fact, and is to be determined by the Lower Appellate Court which has to deal with questions of fact. As the document has never been admitted and has been rejected on the ground mentioned by the Judge in the Lower Appellate Court, which in our opinion is wrong, the judgment of that Court ought to be set aside. We may add that the view we take as to the construction of Art. 1 of Schedule I to the same Act is in accordance with that taken by this Court in the case of *Binja Ram v. Rajmohun Roy*(1), in which Sir Richard Garth observed "whether an account thus signed by the defendant amounts to such an acknowledgment or not depends in each case upon the form and intention of the entry." And in the case of *Bishambar Nath v. Nand Kishore*(2), the Allahabad High Court also took the same view, which was adopted likewise by the Bombay High Court in the case of *Mulji Lala v. Lingu Makaji*(3), where Chief Justice Farran in delivering the judgment of the Full Bench observes—

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"In each case the instrument of acknowledgment must be carefully examined in connection with the surrounding circumstances to ascertain whether it has been signed to supply evidence of a debt."

The result is that the decree of the Lower Appellate Court is set aside, and the case remanded to that Court in order that it may be disposed of in accordance with the directions contained in this judgment.

The costs of this appeal will abide the result.

*Appeal allowed; case remanded.*

M. N. R.

(1) (1891) I. L. R. 8 Calc. 282.

(2) (1892) I. L. R. 15 All. 56.

(3) (1896) I. L. R. 21 Bom. 201.

## CRIMINAL REVISION.

1903

March 10.

SURENDRA NATH SARMA

v.

RAI MOHAN DAS.\*

*Appeal—Restoration of property, order for—Criminal Procedure Code (Act V of 1898) ss. 51, 520.*

An order by a Magistrate directing the restoration of property, in respect of which no offence has been found to have been committed, to the person in whose possession that property was found, is not an order under s. 517 of the Code of Criminal Procedure and is therefore not open to appeal.

*Basudeb Surma Gossain v. Naziruddin*(1), *In re Annapurnabai*(2) and *In re Devidin Durgaprasad*(3) referred to.

RULE granted to the petitioner, Surendra Nath Sarma.

This was a Rule calling upon the Deputy Commissioner of Sylhet to show cause why the order of the Sessions Judge of Sylhet dismissing the appeal of the petitioner should not be set aside and the appeal directed to be heard on the merits.

It appears that the petitioner was the worshipper of the idol *Syam Sundar* in the possession of one Kunjamoni Dassi. The accused Rai Mohan Das was the elder brother of Kunjamoni's deceased husband. Both the accused and Kunjamoni applied for Letters of Administration to the estate of the accused's father Jasmanta, which estate had been dedicated to the idol. While this matter was pending in the High Court, the accused went with a number of men to Kunjamoni's house, and having stated that the High Court had decreed the matter in his favour and that the idol was to be made over to him, compelled the petitioner by threats to carry the idol to his (the accused's) house.

\* Criminal Revision No. 65 of 1903, against the order of H. L. Thomas, Assistant Commissioner of Sylhet, dated Dec. 1, 1902.

(1) (1887) I. L. R. 14 Calc. 834.

(2) (1877) I. L. R. 1 Bom. 630.

(3) (1897) I. L. R. 22 Bom. 844.

The accused was tried under ss. 384 and 417 of the Penal Code by the Assistant Commissioner of Sylhet, who on the 1st December 1902 acquitted the accused and directed :—

“ That the idol, with its appurtenances, be delivered with the help of the police to Rai Mohan Das in whose possession it was found.”

The petitioner appealed against that order to the Sessions Judge of Sylhet, who having held that the order was not one passed under s. 517 of the Criminal Procedure Code and that no appeal lay, dismissed the appeal on the 5th January 1903. Thereupon the petitioner moved the High Court and obtained this Rule.

*Mr. P. L. Roy (Babu Surendra Nath Ghosal with him)* shewed cause. The Sessions Judge was right in holding that there was no appeal against the order of the Assistant Commissioner. That order was not passed under s. 517 of the Code of Criminal Procedure, because the Assistant Commissioner held that no offence was committed in respect of the idol. That being so, the Assistant Commissioner was right in directing that the idol should be delivered to the accused, as the Courts are bound on general principles to restore property under such circumstances to the person from whom it is taken, and in this case the police originally found the idol in the possession of the accused from whom it was taken under the order of the Assistant Commissioner : see *In re Annapurnabai*(1), *Fateh Chand v. Durga Prosad*(2), *In re Devidin Durgaprasad*(3).

*Babu Dasarathi Sanyal* for the petitioner. The Sessions Judge is wrong in holding that he had no jurisdiction to hear the appeal. The order was passed under s. 517 of the Code of Criminal Procedure, and under s. 520 the Judge being the Court of Appeal could alter or annul such an order. The Sessions Judge has erroneously refused to exercise his jurisdiction. The idol was practically in the custody of the Court, because the Magistrate who entertained the complaint passed a provisional order delivering the idol to the petitioner on his giving security, and directing him to produce it before the Court whenever he should be called upon to do so. The idol was not a thing which could be physically in the custody of the Court, as its worship had to be continued.

(1) (1877) I. L. R. 1 Bom. 630.

(2) (1897) 1. C. W. N. 435.

(3) (1897) I. L. R. 22. Bom. 844.

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Although the Assistant Commissioner acquitted the accused, he at the same time found that the idol was taken from the custody of the petitioner on the strength of some misrepresentation made to him by the accused. The cases cited by Mr. Roy are not applicable to the facts of the present case. There is a further point to be considered. The Magistrate who entertained the complaint passed an order making over the idol to the petitioner, and his successor had no jurisdiction to review such order or to rescind it. I submit the Rule should be made absolute.

**HARRINGTON AND BRETT JJ.** In this case a Rule was issued calling upon the Deputy Commissioner of Sylhet to show cause why the order of the Sessions Judge dismissing the appeal of the petitioner should not be set aside and the appeal directed to be heard on the merits.

Having heard the learned counsel and the learned pleader on both sides, we are of opinion that the Rule must be discharged. The order complained of which was passed by the Magistrate was clearly an order directing the restoration of property in respect of which no offence had been committed to the person in whose possession that property was found. It has been held by this Court and by the Bombay High Court in the cases of *Basudeb Surma Gossain v. Naziruddin*(1), *In re Annapurnabai*(2) and *In re Devidin Durgaprasad*(3), that such order is not an order passed under section 517 of the Code of Criminal Procedure. Such an order therefore is not open to appeal, and the Sessions Judge was right in dismissing the appeal on the ground that no appeal lay in this case.

We therefore direct that the Rule be discharged.

*Rule discharged.*

D. S.

(1) (1887) I. L. R. 14 Calc. 834.

(2) (1877) I. L. R. 1 Bom. 630.

(3) (1897) I. L. R. 22 Bom. 844.

## GOPINATH PATNAIK

v.

## NARAIN DAS BANERJEE.\*

1903

Feb. 19.

*Transfer—Withdrawal of case by District Magistrate—Inquiry or trial—Code of Criminal Procedure (Act V of 1898) ss. 253, 528.*

Where a case which was being tried by a Deputy Magistrate, who was about to frame charges against the accused persons, was withdrawn by the District Magistrate to his own file and dismissed under s. 253 of the Criminal Procedure Code, on the ground that the accused, who were policemen, were protected by their warrants :—

*Held*, that the case ought to have been left with the Deputy Magistrate to be disposed of, and that it was for him to determine whether the offence charged was made out, or whether the police were protected by their warrants.

RULE granted to the petitioner, Gopinath Patnaik.

This was a Rule calling upon the District Magistrate of Cuttack to show cause why the order transferring the case to his file should not be set aside or such other order made on the ground that at that stage of the proceedings there was no sufficient reason for taking the case away from the Deputy Magistrate who was engaged in trying it, and on the ground that the law did not warrant the transfer of a case except for the purpose of inquiry or trial, and that that inquiry or trial had not been held by the District Magistrate.

In this case the petitioner lodged a complaint against the accused who were policemen for having trespassed into the house of the Raja of Puri. On the 24th October 1902, the District Magistrate made over the case for disposal to a Deputy Magistrate, who, having heard the petitioner, issued process upon the accused under several sections of the Penal Code. On the appearance of the accused in Court, the Deputy Magistrate commenced the trial, and after having examined the witnesses for the prosecution adjourned the case till the 14th November for the purpose

\* Criminal Revision No. 24 of 1903, against the order of F. N. Fischer, District Magistrate of Cuttack, dated Nov. 21, 1902.

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of drawing up charges against the accused and for the cross-examination of the witnesses. The accused applied to the District Magistrate for transfer of the case from the file of the Deputy Magistrate, alleging *inter alia* that no offence had been made out against them. The District Magistrate thereupon issued a Rule upon the petitioner to oppose the application, and after hearing both parties, on the 21st November, discharged the accused under s. 253 of the Criminal Procedure Code. Against that order the petitioner moved the High Court and obtained this Rule.

*Mr. Jackson (Babu Hemendra Nath Sen with him)* for the petitioner. The case was being tried by the Deputy Magistrate and was postponed by him for the purpose of framing charges against the accused. No reason has been shown for its transfer by the District Magistrate at that stage. The only section under which the District Magistrate could act, was section 528 of the Criminal Procedure Code, and under that section he could only transfer the case to his own file for the purpose of inquiry or trial. Here, however, he has transferred the case to his own file, and without holding any inquiry or trial he discharged the accused, who are policemen, because he thought they were protected by their warrants. This, I submit, is illegal. The question whether or not the accused were protected by their warrants could only be decided by the Deputy Magistrate after a proper trial.

No one appeared to shew cause.

**HARINGTON AND BRETT JJ.**—In this case a Rule was granted calling upon the District Magistrate to show cause why the order transferring the case to his file should not be set aside or such other order made as to this Court might seem fit on the ground that at that stage of the proceedings there was no sufficient reason for taking the case away from the Deputy Magistrate who was engaged in trying it, and on the ground that the law does not warrant the transfer of a case except for the purpose of inquiry or trial, and that that inquiry has not been held by the District Magistrate.

No cause has been shewn against this Rule, and we have perused the explanation that has been submitted by the District



Magistrate ; but in our opinion the statements therein contained do not furnish any explanation which would justify the discharging of this Rule.

It appears that the case in question, which was a case against some policemen for entering the house of a Raja, was being tried before a Deputy Magistrate, and that when the Deputy Magistrate was about to frame charges against the accused persons, the District Magistrate withdrew the case to his file and dismissed it, because he thought the police were protected by their warrants.

In our opinion the case ought to have been left with the Deputy Magistrate to be disposed of, and it would have been for the Deputy Magistrate, who was trying the case, to determine whether the offence charged was made out, or whether, assuming the facts to be proved, the police were or were not protected by the warrants under which they purported to act. No grounds existed that we can see for taking the case away from the Deputy Magistrate.

The Rule is accordingly made absolute, and the order of the District Magistrate is set aside, and we direct that the case be restored to the file of the Deputy Magistrate to be disposed of according to law.

Let the record be returned to the Lower Court with as much despatch as possible.

*Rule absolute.*

D. S.

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## CIVIL RULE.

1903  
 June 1.

PROKASH CHANDRA SARKAR

v.

E. E. ADLAM.\*

*Receiver—Agreement to pay salary of Receiver—Position of Receiver—Civil  
 Procedure Code Act (XIV of 1882) s. 503.*

A promise to pay the salary of a Receiver without leave from the Court, even if unconditional, being in contravention of the law, is not binding on the promisor.

A Receiver being an officer of the Court, the Court only is to determine his fees or remuneration; and the parties cannot by any act of theirs add to, or derogate from, the functions of the Court without its authority.

*Manick Lall Seal v. Surrat Coomaree Dasseo*(1) referred to.

RULE granted to the defendants, Prokash Chandra Sarkar and another.

This Rule arose out of a decree of the Court of Small Causes, Gaya, dated the 12th September 1902. The facts show that upon the application of all the defendants, the plaintiff, E. E. Adlam, was, on the 14th September 1901, appointed Receiver of the estate of one Ram Narayan Ram and others who were the judgment-debtors in a suit. By this order it was clearly stated that all expenses were to be paid out of the collections. The Receiver could not collect sufficient money, and the District Judge verbally advised the petitioners, the decree-holders in that suit, to finance the Receiver for two or three months by way of an advance or loan, in order that the Receiver might carry on his work in the villages, and that such advance be paid off with interest by the Receiver from his collections.

One of the petitioners having made a conditional promise to pay two-thirds of the Receiver's salary provided another defendant paid his share of the same, the Receiver on several occasions wrote to the petitioners demanding his salary, but they refused to pay him in contravention of the standing orders of the District

\* Civil Rule No. 293 of 1903, against the order of R. C. Roy, Small Cause Court Judge of Gaya, dated Sept. 12, 1902.

(1) (1895) I. L. R. 22 Cal. 648.

Judge. Ultimately the plaintiff (Receiver) applied to the District Judge of Gya, requesting him to order the petitioners and their co-sharers to pay him his salary. On the 4th April, 1902, the District Judge passed an order that the Court had no power to direct the remuneration of the Receiver to be met otherwise than from the rents and receipts of the property in his hands, and refused to make the order prayed for.

In consequence of the above order the plaintiff (Receiver) instituted a suit on the 28th July 1902, in the Court of Small Causes, Gya, and obtained a decree on the 12th September 1902 against the petitioners with costs.

Thereupon the petitioners moved the High Court and obtained this Rule against the plaintiff (Receiver) to show cause why the decree obtained in the Court of Small Causes, Gya, should not be set aside, mainly on the grounds that the said decree was *ultra vires* and made without jurisdiction.

*Babu Sarat Chandra Roy Chowdhury and Babu Manmatha Nath Mukerji* for the petitioners. The Receiver is an officer of the Court, and he should look to the Court and nobody else for his remuneration. In answer to the argument of the learned Judge of the Court of Small Causes, that the petitioner had entered into a contract to make advances to the Receiver, I submit that, that contract is not only void for want of consideration, but must also be looked upon as a contempt of Court: see *Manick Lall Seal v. Surrut Coomaree Dassee* (1).

No one appeared to shew cause.

**PRATT AND MITRA JJ.** This is a Rule to shew cause why the decree of the Court of Small Causes, Gya, dated the 12th September 1902, should not be set aside. It appears that the plaintiff was appointed Receiver of certain properties on an application of all the defendants. The order of the District Judge appointing the plaintiff a Receiver was made on the 14th February 1901. The Receiver apparently could not collect sufficient money. On the 22nd February 1902, one of the defendants, namely, defendant No. 1, made a conditional promise to pay him two-thirds of his salary provided the third defendant, who was

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interested in a one-third share, also paid his share of the same. No money was, however, paid by the defendants, and the plaintiff applied to the District Judge for an order directing the defendants to pay his salary. The District Judge made the following order: "It does not seem that this Court has any power to order the remuneration of the Receiver to be met otherwise than from the rents and receipts of the property in his hand; no order can, therefore, be passed as prayed for by the Receiver."

Thereafter the plaintiff instituted the present suit without any leave from the District Judge and obtained a decree against defendants Nos. 1 and 2 for two-thirds of his salary calculated up to the date of the institution of the suit. Now, the defendant No. 2 is a minor; and even if the plaintiff could recover under the promise made on the 22nd February 1902, there could be no decree passed against the minor. The Court below, however, gave a decree for two-thirds of the salary, mainly relying upon this promise made on the 22nd February.

It seems to us that even if defendant No. 1 had made a promise to pay, and even if it was not conditional, yet it was not binding, as it was made in contravention of the law. Under section 503 of the Code of Civil Procedure, the Court is to determine what fee or commission a Receiver is entitled to by way of remuneration. The Receiver is an officer of the Court, and the parties cannot by any act of theirs add to or derogate from, the functions of the Court without authority from the Court itself. In the case of *Manick Lall Seal v. Surrut Coomaree Dassee* (1), this Court held that an agreement between a Receiver and a party without the knowledge of the Court was a gross contempt of Court.

We are of opinion that the parties in the present case entered into a contract which was not valid, and, therefore, the suit was not maintainable. We, therefore, set aside the decree complained of and make the Rule absolute with costs.

*Rule absolute.*

R. G. M.

(1) (1895) I. L. R. 22 Calc. 648.

## ORIGINAL CIVIL.

BENODE BEHARY MOOKERJEE

v.

RAJ NARAIN MITTER.\*

1908

Feb. 25.

*Plaint, Amendment of—Mistake—Limitation—Power of Receiver to sue—Limitation Act (XV of 1877) s. 19—Acknowledgment of liability.*

By an order of the Court the plaintiff was appointed Receiver in a certain suit with authority to sue for and recover an attached debt. Through some mistake in the office of the attorneys of the plaintiff in that suit, the money sought to be attached was wrongly described in the Tabular Statement as money due under the agreement of the 25th October 1895, whereas it should have been the agreement of the 26th August 1895, and the Court, acting on this representation, made the order, which applied to the alleged agreement of the 26th October 1895. On application to amend the order and the plaint or in the alternative to read the existing order as if it were in reality applicable to the right agreement:—

*Held*, that no order for amending the plaint or the order could be made; the amendment of the order would operate only as a new order, taking effect from the date on which it is made, and could not therefore operate as the basis or authority for the present suit. The plaintiff's authority to maintain this suit depends solely upon the order appointing him Receiver: if it has been made under any mistake, it cannot by any course of construction be regarded as applying to anything other than the subject-matter specified by the order itself, the intention of the parties being immaterial.

*Way v. Hearn* (1) distinguished.

In order to satisfy the requirements of s. 19 of the Limitation Act, though a promise to pay need not be made out, it is necessary when the right claimed is a debt that an unequivocal and unqualified admission of the debt or a part of it or of the subsisting relationship of debtor and creditor should be established. There is a distinction in this respect between the law of limitation applicable in England and that in force in this country.

*Fink v. Buldeo Dass* (2) distinguished; *Venkata v. Parthasaradhi* (3) approved of.

*Quære*: Whether, having regard to the terms of s. 50 of the Code of Civil Procedure, a plaintiff can be allowed to take advantage of any ground of exemption from the ordinary law of limitation which has not been pleaded in the plaint.

## ORIGINAL SUIT.

One Jogeshwar Roy, a builder and contractor, had entered into an agreement on the 26th August 1895 with the defendant to do

\* Original Civil Suit No. 447 of 1899.

(1) (1862) 13 C. B. (N.S.) 292, 304. (2) (1899) I. L. R. 26 Calc. 715.

(3) (1892) I. L. R. 16 Mad. 220.

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some building works for the settled sum of Rs. 29,500 and to finish the same by the 16th November 1895 and to pay, in the event of his not so finishing in due time, Rs. 30 per day as compensation from the due date until actual completion. The work was done under the supervision of Hari Charan Pal, an engineer employed by the defendant, who on the 26th of July 1896 gave a certificate by which he certified that the work had been satisfactorily completed.

On the 25th October 1895 the said Jogeshwar Roy in consideration of the sum of Rs. 3,000 executed a promissory note in favour of one Girdhari Lall, and as security for the amount hypothecated the debt due and owing to him (Jogeshwar Roy) by the defendant under the said agreement of 25th August 1895. The said Girdhari Lall instituted a suit in this Court, being suit No. 377 of 1897, against the said Jogeshwar Roy for the amount due under the promissory note, and this Court by its decree dated the 5th of May 1898 ordered and decreed the said Jogeshwar Roy to pay the amount claimed to the said Girdhari Lall, and further ordered that the amount claimed and decreed should form a charge on the debt due under the agreement mentioned in the plaint therein. Girdhari Lall, then proceeded to execute the decree by attaching the money in the hands of the defendant, Raj Narain Mitter, but through some mistake made in the office of the attorneys of Girdhari Lall, the money was wrongly described in the Tabular Statement as money due under the agreement of the 25th October 1895, whereas it should have been described as money due under the agreement of the 26th August 1895. In the Tabular Statement the mode in which the assistance of the Court is sought was described in this manner :—"By attachment of the moneys in the hands of R. Mitter, Barrister-at-Law, belonging to the defendant, Jogeshwar Roy, for work done and materials supplied under an agreement made between the said Mr. Mitter and the defendant, Jogeshwar Roy, and dated the 25th day of October 1895, upon which the decretal amount forms a charge under the decree in this suit." Acting upon this representation, on the 1st of September 1898 this Court by its order of that date prohibited and restrained the said Jogeshwar Roy from receiving from the defendant the moneys due under "an argeement dated

the 25th October 1895," and the defendant from making payment of the said moneys or any portion thereof to any person whomsoever. This prohibitory order was followed by an order of the 8th March 1899 in the said suit No. 377 of 1897, which gave liberty to the defendant under s. 268 of the Civil Procedure Code to pay into Court the amount due from him and in default of payment appointed the present plaintiff as Receiver to realise the said moneys with power to institute a suit in his own name.

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The plaintiff as such Receiver on the 14th of July 1899 instituted this suit for an account of what is due by the defendant to the said Jogeshwar Roy in respect of the agreement dated the 25th August 1895, and in order to establish that the cause of action was within the period prescribed by the Statute of Limitation, he relied upon an alleged acknowledgment in writing by the defendant of the 18th June 1898. The terms of the writing are given in the judgment.

Mr. Pugh (Mr. Garth with him), for the defendant, contended (i) that the suit could not be maintained in its present form because the plaintiff had no authority to institute this suit; he was authorised to bring a suit in respect of the contract dated the 25th October 1895 and no other contract. He could not be allowed to succeed upon a different cause of action: *Govindrao Desumukh v. Ragho Deshmukh*(1), and *Sheo Prasad v. Lalit Kuar*(2). And (ii) that the plaintiff's right to sue, if any, was barred by the law of limitation. The acknowledgment relied on in the plaint as furnishing a new period of limitation was not an acknowledgment of such express and unambiguous character as would satisfy s. 19 of the Limitation Act: *Venkata v. Parthasaradhi*(3); nor is it stamped: Art. 1 of Sch. I to the Stamp Act; *Binja Ram v. Rajmohun Roy*(4) and *Mulji Lala v. Linga Makaji*(5).

Mr. Avetoom (Mr. Gregory with him) for the plaintiff. I ask for leave to amend the order authorising the plaintiff to sue or,

(1) (1884) I. L. R. 8 Bom. 543.

(3) (1892) I. L. R. 16 Mad. 220.

(2) (1896) I. L. R. 18 All. 408.

(4) (1881) I. L. R. 8 Calc. 282.

(5) (1896) I. L. R. 21 Bom. 201.

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in the alternative, I invite the Court to read the existing order as if it were in reality applicable to the right agreement: see *Way v. Hearn*(1).

The acknowledgment relied upon in the plaint is a proper acknowledgment under s. 19 of the Limitation Act: *Fink v. Buldeo Dass*(2). It does not require to be stamped: *Futechand Harchand v. Kisan*(3).

SALU J. This is a suit brought by the plaintiff as the Receiver appointed by this Court in Suit No. 377 of 1897 by way of equitable execution to recover from the defendant a debt alleged to be due from him to one Jogeshwar Roy whom the defendant employed as a builder to do certain work for him.

Two grounds of objection have been taken to the suit being maintained in its present form, and in dealing with them it will be necessary to examine with some minuteness the special circumstances material to the case. The first objection is as to the power or authority of the plaintiff to maintain this suit, and the second ground of defence is limitation. It appears that in 1897 a suit was instituted by Girdhari Lall Dhananiah against the builder Jogeshwar Roy to recover Rs. 3,000 due on a promissory note executed by Jogeshwar Roy in favour of the plaintiff Girdhari Lall Dhananiah, and in the plaint the plaintiff alleged that as security for the amount due under the promissory note the defendant had hypothecated the debt due to him by the present defendant Raj Narain Mitter, and the plaintiff in that suit claimed that the amount due to him under the promissory note should be declared by the decree to be a charge upon the debt. The debt from Mr. Mitter is alleged in the plaint to be due in respect of an agreement of the 26th August 1895, and the date of the promissory note is 25th October 1895. A decree was made in this suit substantially in the terms of the prayer of the plaint, and the amount of the debt alleged by the plaintiff to be due under the agreement of the 26th August 1895 was alleged in the plaint to be a sum of Rs. 11,500. The plaintiff Girdhari Lall Dhananiah then, in order to realize the debt due from the

(1) (1862) 13 C. B. (N. S.) 292, 304. (2) (1899) I. L. R. 26 Calc. 715.

(3) (1893) I. L. R. 18 Bom. 614.

defendant, proceeded to attach the money in the hands of Mr. Mitter sought to be charged by him; but through some mistake made in the office of the attorneys of the plaintiff Girdhari Lall Dhananiah, the money sought to be attached was wrongly described in the Tabular Statement as money due under the agreement of the 25th October 1895, whereas it should have been described as money due under the agreement of the 26th August 1895. In the column relating to the mode in which the assistance of the Court is sought the plaintiff asked for the assistance of the Court to be rendered in this manner:—"By attachment of the moneys in the hands of R. Mitter, Barrister-at-Law, belonging to the defendant Jogeshwar Roy for work done and materials supplied at the premises No. 15-3 Gopal Lall Tagore's Road, Paranagore, under an agreement made between the said R. Mitter and the defendant Jogeshwar Roy and dated the 25th day of October 1895, upon which the decretal amount forms a charge under the decree in this suit." The Court, acting upon the representations contained in the plaintiff's Tabular Statement, attached the money alleged to be due under the agreement of the 25th October 1895 by prohibitory order on Mr. Mitter, directing him not to part with the moneys due to Jogeshwar Roy under that agreement. Subsequently and pursuant to the order of attachment, the Court was applied to, and did, under sections 268 and 503 of the Code and by way of equitable execution, appoint the present plaintiff as Receiver to recover by suit the attached money in the hands of Mr. Mitter. It is not necessary to refer further to the order appointing the plaintiff Receiver. Suffice it to say that the order of appointment authorized the Receiver to sue for and recover the attached debt. Pursuant to the authority contained in the order of appointment the plaintiff filed the present suit on the 14th July 1899. In the paragraphs of the plaint relating to the order of appointment and the agreement under which the money is alleged to be due the recitals are full of mistakes. The mistake as to the date of the agreement does not appear to have been discovered until a late stage in the proceedings in the suit. In a further written statement filed by the defendant the defence was taken that the plaintiff has no authority to maintain this suit by reason of the fact that the money sought to be recovered

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was not the money which had been attached in the hands of the defendant. Subsequently to the filing of the further written statement, an application was made to me in chambers by the attorney for the plaintiff upon a petition for leave to amend the Tabular Statement and prohibitory order. This application was made in the suit in which Girdhari Lall Dhananiah was plaintiff. I declined to make any order on that application. I thought the amendment could not be made at that stage, and I directed that the application should be mentioned in the present suit when the defendant would have an opportunity of being heard. The matter has now been fully discussed, and there can be no question that the mistake, for such it undoubtedly was, originated in the application for execution made by the plaintiff in the earlier suit.

The Court is always unwilling to allow a mistake made inadvertently to operate prejudicially against a party, and accordingly I have carefully considered the question now raised with a view to see whether it would be possible to give plaintiff leave to amend the present plaint, and for that purpose whether I ought not to adjourn the case so as to enable the plaintiff to obtain a fresh order of attachment so as to make it applicable to the money due under the agreement of the 26th August 1895. I am clearly of opinion that no such order for amendment can be made in this case. The matters complained of are not such as can be set right by amendment. The question is one which goes to the root of the authority of the plaintiff to maintain this suit; and if I were to make an order for amendment of the order for attachment of the money due to Jogeshwar Roy under the agreement of the 26th August 1895, the amendment would operate only as a new order of attachment and a new order for appointment of Receiver, and such orders would only operate from the date on which they were made. They could not therefore operate as the basis or authority for the present suit. But another view of the question has been presented to the Court. It is this that there is no necessity to make a new order of attachment. I am invited to read the existing order as if it were in reality applicable to the right agreement, notwithstanding the fact that the agreement is wrongly described

as the agreement of the 25th October, and reliance is placed on the case of *Way v. Hearn* (1), where in construing an agreement which, though clear in its terms, is not applicable to existing facts, the Court allowed evidence to be given so as to show what the actual facts were to which it was intended that the agreement should refer. This principle is embodied in section 95 of the Evidence Act, but it seems to me that this principle cannot be invoked to assist the plaintiff in the present suit. In this case the Court has not to find the intention of the parties. Here we have to do with an order of Court which is the sole authority of the plaintiff to maintain the suit, and it seems that the intention of the parties is immaterial to the question as to the title or authority of the plaintiff to maintain this suit, which must solely depend upon the order appointing the Receiver. However, regrettable the mistake may be under which the prohibitory order was made it is impossible, I think, by any course of construction, to regard the order as applying to anything other than the subject-matter specified by the order itself. The effect of the mistake is to make the prohibitory order a nullity, and it follows that the order for the appointment of the plaintiff as Receiver to recover the money alleged to be due under an agreement which does not exist must be a nullity also. That being so there is nothing to prevent the plaintiff from obtaining a new order for attachment and a new order for the appointment of a Receiver.

But supposing this objection could be surmounted, it appears to me that there is another grave difficulty in the way of the plaintiff created by the defence of limitation set up. The money that the plaintiff seeks to recover is claimed in respect of work done under the agreement of the 26th August 1895. It is admitted that certain extra and additional work was done which was outside the agreement mentioned, which work is not the subject of the present suit which is confined to work done under the agreement and not otherwise. By a clause in the agreement it is provided that the work done thereunder must be finished before the 1st Aughran 1302, corresponding with the 16th November 1895, and it being alleged that the work under the agreement was duly executed and completed, the suit on the face

(1) (1862) 13 C. B. (N. S.) 292, 304.

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of the plaint would appear to be barred unless some special case is shown extending the period of limitation.

In the last paragraph of the plaint the special case is shown which is relied upon as an answer to the plea of limitation which would otherwise be maintainable. The paragraph runs thus:—
 “The plaintiff’s cause of action arose within the jurisdiction of this Hon’ble Court and is within the period prescribed by the Statute of Limitation, as the defendant acknowledged in writing the debt on the 18th day of June 1898.” Section 50 of the Code of Civil Procedure provides that the plaint must show the ground upon which exemption in respect of the law of limitation is claimed. The words are:—“If the cause of action arose beyond the period ordinarily allowed by any law for instituting the suit, the plaint must show the ground upon which exemption from such law is claimed,” and there is no doubt that under that provision of the law the express acknowledgment relied upon was set out in the 12th paragraph of the plaint. Now the acknowledgment referred to in the 12th paragraph of the plaint is contained in a certain writing by the defendant which was made upon a receipt relating to a letter and bill for works and repairs done to the defendant’s house at Baranagore. The receipt is dated the 9th June 1898, and the writing thereon by the defendant is in these terms:—“The bill glanced over is incorrect; large amounts have been wrongly introduced. I will first have the work examined, although I know that the whole of the work is not yet finished. Then I will examine the estimates, and after deducting what has to be deducted, I will see what is due.” Now it has been contended that the writing is an acknowledgment of liability within the meaning of section 19 of the Limitation Act. An acknowledgment to fall within this section must be an acknowledgment of liability in respect of the right claimed. Now it is difficult to say that the defendant intended in any sense to admit liability in respect of any portion of the amount of the bill. He had paid large sums to the builder, and he was even claiming the right to exact a penalty for the non-completion of the work within the contract period. It seems to me that the writing is so expressed as to avoid any admission of liability. The defendant does not, I think, admit that anything is due

on the bill. What he says is, he will examine the bill and deduct what has to be deducted, and then he will see what the result is. But it is said it is sufficient if the acknowledgment amounts to an admission of an open account, because if it is an acknowledgment of an unsettled account, then a promise is implied from such acknowledgment to pay what may be due on that account. There is no doubt that an acknowledgment of that partial or conditional character would be sufficient under English law to prevent the operation of the English law of limitation, because the suit is based not on the acknowledgment, but upon the implied promise to pay. The law is different in this country, and an acknowledgment to save limitation in respect of a debt must be an express acknowledgment of liability in respect of the debt claimed or of some part of it. The right claimed in this case was a debt—not a right to an account based upon a mutual open and current account. Reference has been made to the decision of this Court in the case of *W. R. Fink v. Buldeo Dass*(1). There is no doubt an expression in the judgment of the learned Judge who decided that case which would seem to show that in the opinion of the learned Judge the law in England was the same as the law in this country, but the question did not, strictly speaking, arise. The matter really in issue was whether certain letters written by the defendant to the plaintiff did contain an acknowledgment of debt. In this respect the decision to which I have referred is distinguishable from the present case; nor does it appear that the Judge's attention was directed to the decisions of this Court under section 19 of the Limitation Act and to the distinction existing between the law of limitation applicable in England and that in force in this country; while the law in this country does not require that a promise to pay should be made out to avoid limitation, it is necessary when the right claimed is a debt that an unequivocal and unqualified admission of the debt or a part of it or of the subsisting relationship of debtor and creditor should be established to satisfy section 19 of the Limitation Act: see *Venkata v. Parthasaradhi*(2). It seems to me therefore that the acknowledgment relied on in the plaint as furnishing a new period of limitation

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(1) (1899) I. L. R. 26 Calc. 715.

(2) (1892) I. L. R. 16 Mad. 220.

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is not an acknowledgment of that express and unambiguous character to satisfy s. 19 of the Limitation Act. But apart from the ground relied on in the plaint, it has been sought to avoid limitation in two other ways. First, it is said there is another acknowledgment not made by the defendant himself, but by an agent appointed by him to supervise the work done by Jogeshwar Roy; this acknowledgment is not referred to in the plaint at all; and then in the alternative it is argued as the second mode of avoiding limitation that no acknowledgment of liability is necessary, as the work, the subject of the suit, was not completed, as the plaint implies, in November 1895 but continued for some time afterwards. This raises the question whether the plaintiff can be allowed to take advantage of any express ground of exemption from the ordinary law of limitation which has not been pleaded in the plaint, having regard to the terms of section 50 of the Civil Procedure Code.

If it had been shown that any reasonable ground existed for giving the plaintiff an opportunity for proving a later acknowledgment of liability by the defendant or his agent and had I been asked to do so, I should probably have given the plaintiff leave to amend his plaint so as to enable him to plead and prove the new ground of exemption. I have heard the evidence of Jogeshwar Roy, the builder, and of the engineer who was engaged by Mr. Mitter to supervise the work, and who, it is alleged, made an acknowledgment of liability which the plaintiff now seeks to take advantage of.

The evidence of Hari Charan Pal, the engineer, was of a very unsatisfactory character. The shuffling manner in which he gave his evidence makes it impossible to place any reliance upon it at all, and it is quite impossible to say when, according to this witness, it was that the work agreed to be done under the agreement of the 26th August was completed, or whether it was not completed as the plaint implies at or before November 1895. Moreover, it appears that the acknowledgment relied on as being given by this witness was in reality given by him not as agent of the defendant, but under circumstances which show that the object was to give an unfair advantage to Jogeshwar Roy and to prejudice the defendant. In no sense can it be said that the

certificate relied on by the plaintiff is a genuine certificate, and, moreover, at the time the so-called certificate was given, the witness was obliged to admit that he had ceased to be employed by the defendant. I am satisfied he was acting in collusion with Jogeshwar Roy at the time when the certificate sought to be relied on was granted. Jogeshwar Roy has been called, and no doubt states the work under the agreement of the 26th August 1895 was not done within the period mentioned in the contract, but he is unable to fix the time when the work to be done under the agreement was in fact completed.

It appears to me that the case attempted to be made by Jogeshwar Roy and Hari Charan Pal as regards the non-completion of the work is an after-thought. It is not the case made originally in the plaint. The plaint was framed in a very different way, and there is no doubt it was so framed deliberately in order to avoid payment of the penalty which Mr. Mitter was claiming for non-completion of the work.

The plaintiff ought not to be allowed to put forward a new case inconsistent with the plaint to enable him to avoid limitation.

That being so, it seems to me that the plea of limitation has also been established. I must, therefore, dismiss the suit with costs.

Attorneys for the plaintiff: *Leslie and Hinds.*

Attorney for the defendant: *U. C. Dutt.*

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CIVIL RULE.

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RAMJADU RAKSHIT.*

Dispossession—Symbolical possession, effect of—Civil Procedure Code (Act XIV of 1882) ss. 318, 335—Jurisdiction.

Symbolical possession does not amount to dispossession as contemplated by s. 335 of the Code of Civil Procedure.

RULE granted to Ramjadu Rakshit and other decree-holders.

Ramjadu Rakshit and others obtained a decree for arrears of rent against their tenants, Lachmi and Golap. In execution of that decree they brought the defaulting tenure to sale and purchased it themselves on the 12th February 1902. The sale was confirmed on the 18th March 1902, and formal possession was delivered to the purchasers on the 16th November 1902. One Ibrahim Mullick and another made an application on the 5th December 1902 in the Court of the 3rd Munsif of Serampore under s. 335 of the Civil Procedure Code on the allegation that, by the delivery of possession, formal possession of a tank belonging to them was given to the purchasers. They stated in their application that the object of it was to protect themselves against any disturbance in their possession of the said tank, and prayed for an inquiry by the Court as to the alleged dispossession. The decree-holders objected that the application was not tenable under s. 335 of the Civil Procedure Code, as it appeared from the petition itself that the applicants were still in possession of the tank; and, moreover, the applicant in his deposition stated that he was still holding possession of the disputed tank. The learned Munsif overruled the objection of the decree-holders and allowed the application.

Thereupon the decree-holders moved the High Court and obtained this Rule.

* Civil Rule No. 1440 of 1903, against the order of Kali Das Mukerjee, Munsif of Serampore, dated Feb. 14, 1903.

Babu Shib Chandra Palit for the petitioners. The Court below was wrong in entertaining the application under s. 335 of the Code of Civil Procedure. That section gives jurisdiction to a Court where there has been actual dispossession. There only formal possession was given to the decree-holder by sticking bamboos. Upon the petitioner's own showing, it appeared that he was not dispossessed by the delivery of possession, as he admitted in his deposition that he was still holding possession. It was only to protect himself against future disturbance that he made the application. That would not give jurisdiction to a Court under s. 335 of the Civil Procedure Code to entertain the application. S. 318 of the Code lends support to my contention. In this case no possession was delivered by removing anybody who was in actual possession of the tank. The case of *Kisori Lal Goswami v. Lala Shib Lal*(1) is in my favour.

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Mr. K. N. Chaudhuri (Babu Girish Chandra Pal with him) for the opposite party. The case cited by the other side is distinguishable. In that case symbolical possession was given under s. 319 of the Civil Procedure Code, whilst in the present case delivery of possession was given under s. 318 of the Code by sticking bamboos. The Court is only to look into the application of the petitioner, and not into his deposition which he might have given later on. In the application, he stated that by the delivery of possession to the decree-holders he was dispossessed of his tank, as it was included in the writ of delivery of possession. If that was true, and as it was found by the Court below to be true, the Court had jurisdiction to entertain the application under s. 335 of the Code of Civil Procedure.

Babu Shib Chandra Palit in reply.

MACLEAH C.J. The only question we have to consider on this application is whether the applicant in the Court below has brought his case within section 335 of the Code of Civil Procedure, so as to give the Court jurisdiction to act under that section: we have nothing to do with any other question. That section allows a summary proceeding in certain cases. It says :—"If in

(1) (1897) 1. C. W. N. 343.

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delivering possession" of the property purchased "any such person," that is, a third person, "is dispossessed, the Court, on the complaint of the purchaser or the person so dispossessed, shall enquire into the matter of dispossession." The question we have to consider is whether the applicant in the Court below was dispossessed within the meaning of the section. I think that, upon his own showing, whatever may be the ulterior rights of the parties, he has not been so dispossessed as to entitle him to apply in the summary way authorized by the section. On his own evidence he is still in possession : he has not been dispossessed. It is said that he has been dispossessed because symbolical possession has been given of the tank in question to the petitioner. Whatever, as between the parties, ultimately may be the legal effect of this, it does not amount to the dispossession contemplated by section 335. Section 318 throws at least a side light upon what is meant by "dispossession" in section 335.

I may point out that if the tank in question belongs to the opposite party, he can assert his right by suit : at present he is in physical possession of the tank.

The Rule must be made absolute with costs.

CHIT J. I concur.

Rule absolute.

S. C. G.

CIVIL REFERENCE.

ABDUL GAFUR

v.

W. J. ALBYN.*

1908

May 1.

Execution of decrees—Attachment of salary—Prohibitory order—Railway servants, salaries of—Civil Procedure Code (Act XIV of 1882) ss. 268, 617—Small Cause Court, Jurisdiction of—Disbursing office outside the jurisdiction of the Court—Transfer of decrees for execution.

A Small Cause Court has no authority to attach the salary of a Railway servant that has not yet fallen due, by a prohibitory order issued under s. 268 of the Code of Civil Procedure to the officer whose duty it is to disburse the salary, when the disbursing office is situate outside the jurisdiction of the Court. The decree must be sent for execution to the Court within the local limits of which the disbursing office is situate.

A disbursing officer who has so far submitted to such a prohibitory order as to recover and keep in deposit with him the portion of the salary attached, is not bound to pay the money into the Court which attached it without jurisdiction.

Hossain Ally v. Ashotosh Gangooly(1) and *Parbati Charan v. Panchanand*(2) followed; *In the matter of J. Hollick*(3) explained.

CIVIL REFERENCE.

This was a reference made by the Munsif of Gobindapur, exercising the powers of a Small Cause Court Judge, under s. 617 of the Code of Civil Procedure.

The case as stated by the learned Munsif for the decision of the High Court, in which the facts and his opinions are fully set out, was as follows:—

“One Abdul Gafur obtained a Small Cause Court decree for Rs. 37-13 from this Court against one Mr. W. J. Albyn, who is a gunner guard employed at Dhanbad, a Railway station of E. I. Railway within the local limits of the jurisdiction of this Court, on the 23rd June last. On the 31st July 1902, he took out execution and prayed for the attachment of the judgment-debtor's salary for the month of July 1902. An attachment order was first served on the Agent of

* Civil Reference No. 1A of 1903 by Jnanendra Chandra Banerjee, Munsif of Gobindapur, dated Jan. 26, 1903.

(1) (1878) 3 C. L. R. 30.

(2) (1884) I. L. R. 6 All. 243.

(3) (1868) 2 B. L. R. (A. C.) 108; 10 W. R. 447.

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the said Company, who resides in the town of Calcutta, under section 268, Civil Procedure Code. In reply, the Chief Auditor informed me that the judgment-debtor's salary for July had been passed for that month prior to the receipt of this Court's order, and at the same time he raised objection to the jurisdiction of this Court to pass an order for attachment. As the Chief Auditor, instead of the Agent, addressed the letter to me named above, I requested him to name the officer of the said Railway Company whose duty it is to disburse the salary of the said judgment-debtor, and to let me know where the salary of the judgment-debtor is actually paid. He by his replies informed me that the disbursing officer is he himself, and that the salary of the judgment-debtor has for the past few months been paid on the station at Dhanbad, which is within the jurisdiction of this Court. The execution case was dismissed as infructuous on the 28rd August 1902.

"The decree-holder on the 23rd September 1902 again applied for execution of his decree. In the said application he prayed for the attachment of a moiety of the judgment-debtor's salary for the month of September 1902 and of subsequent months until the entire amount of the decree was realised. Accordingly an order for attachment under section 263, Civil Procedure Code, was passed and a prohibitory order was served on the judgment-debtor, and another copy of the same was also served upon the Chief Auditor, whose office is in the town of Calcutta, through the Small Cause Court, Calcutta. That order was duly served on the said officer, as would appear from the affidavit of the bailiff of the Small Cause Court, Calcutta. The Chief Auditor by his letter dated the 12th December informed me that the amount of the decree was recovered from the debtor and held in deposit pending orders from the Court.

"I accordingly made an order and served a copy of the same through the Small Cause Court, Calcutta, upon the Chief Auditor, requiring him to remit the attached money to this Court by postal money-order. He in reply by his letter dated the 5th January 1903 stated that no payment could be made until an order from the Court of Small Causes, Calcutta, was received directing payment of the attached amount into that Court. I then addressed a letter to the Agent of the said Company, pointing out that the Calcutta Small Cause Court served my order on the Chief Auditor in a ministerial capacity, and as such is not competent to pass any order in connection with the execution case under reference, and that only this Court is competent to pass an order for payment of the money held under attachment, and asking him to direct the Chief Auditor to carry out the order of this Court without further delay. The Agent by his letter dated the 23rd January disputes this Court's authority to require payment into Court of the money attached, and has thereby declined to give effect to the order of this Court."

"Under the circumstances stated above, and inasmuch as the decree under execution is a Small Cause Court decree, I am (under s. 617, Civil Procedure Code) compelled to refer to the Hon'ble Court for its consideration and orders the following questions:—

"1. Whether the salaries of Railway servants residing and working for gain and actually getting their pay within the local jurisdiction of a Court can be attached in execution of Small Cause Court decrees passed by such Court?

"In my opinion such salaries could be attached when the judgment-debtors reside and work for gain within the jurisdiction of such Court, and the clause (a) of para. 2, s. 228, Civil Procedure Code, does not stand in the way of executing decrees by such Court against such judgment-debtors.

"2. Whether in such cases such Court is competent to serve through the Small Cause Court, Calcutta, the attachment named in paras. 4 and 5 of s. 268, Civil Procedure Code, on the disbursing officer having his office in the town of Calcutta, and the said disbursing officer on receipt of such order is bound to give effect to the orders of the Court ?

"In my opinion s. 268, Civil Procedure Code, fully authorises such Court to serve upon the disbursing officer in Calcutta an order attaching the salaries of Railway servants residing, working for gain, and getting their pay at stations within the jurisdiction of such Court. *In the matter of J. Hollick*(1) supports my opinion.

"3. When the salary of a Railway servant working within the local jurisdiction of a Court has been ordered to be attached in execution of a Small Cause Court decree passed by such Court, and when the disbursing officer has given effect to such attachment by recovering the decree money from a Railway servant and holding in deposit the said amount, whether such Court is competent to order the disbursing officer to pay the attached amount into Court (to remit the amount by postal money-order), and if any such order is made and duly served upon such disbursing officer, whether the latter is bound to carry it out ?

"In my opinion the last and the last but two paras. of s. 268, Civil Procedure Code, authorise such Court to pass any order it thinks proper in connection with the attached amount, and the disbursing officer is bound by such order, and he is also bound to pay the attached amount into such Court, and there is no valid ground for the Railway officers to dispute the power of such Court to ask the Chief Auditor to send money to the Court. A decree-holder would certainly derive no benefit by attaching the salary of a Railway servant if the disbursing officer simply holds the attached money in deposit without making any payment of the same. The decree-holder's object for attaching such salary is ultimately to get the amount in satisfaction of his decree. In my humble opinion it is absurd and unreasonable to suppose that a Court which has power to attach the salary of a Railway servant has no power to give the judgment-creditor the relief of actually obtaining the attached money. The last para. of s. 268, Civil Procedure Code, enjoins that a disbursing officer is to pay into Court the attached money from time to time, and I think he is bound to do so whenever so ordered by the attaching Court."

*Mr. O'Kinealy and Dr. Ashutosh Mookerjee for the Railway Company.*

**BATERJEE AND PARGITER JJ.** This is a reference from the Munsif of Gobindapur exercising the powers of a Small Cause Court Judge, under section 617 of the Code of Civil Procedure,

(1) (1868) 2 B. L. R. (A. C.) 108; 10 W. R. 447.

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which has been transmitted to this Court through the Judicial Commissioner of Chota Nagpur, and the first question referred to us is, whether the salaries of Railway servants residing and working for gain and actually getting their pay within the local jurisdiction of a Court can be attached in execution of a Small Cause Court decree passed by such Court.

The learned Munsif is of opinion that the question should be answered in the affirmative, and so it ought from one point of view, no doubt. If the attachment is made by the Small Cause Court at or about the time when the agent of the disbursing officer is going to hand the money to the Railway servants within the jurisdiction of that Court, the attachment would be valid, for it would then be an attachment of a debt due to the judgment-debtor made within the jurisdiction of the attaching Court. But if the attachment is of salary that has not actually fallen due, and is made in the manner indicated in section 268 of the Code of Civil Procedure by a prohibitory order requiring the officer whose duty it is to disburse the salary, to withhold every month such portion as the Court may direct until the further orders of the Court, the attachment in such a case is attachment of a debt not of course actually due to the judgment-debtor, but anticipated to fall due to him, month by month, at the place where the disbursing officer has his office, and such an attachment can be made only by the Court having jurisdiction at the place where the disbursing officer has his office. It would seem from the statement of facts in this reference that the attachment here was of this latter description, and if that was so, the attachment was made in Calcutta, where the Munsif of Gobindapur has no jurisdiction. The view we take is in accordance with that taken by this Court in the case of *Hossein Ally v. Ashotosh Gangoolly*(1) and by the Allahabad High Court in the case of *Parbati Charan v. Panchanand*(2), and it is not really in conflict with that taken by this Court in the case of *J. Hollick* (3), because there the order was made by the Monghyr Court, within whose jurisdiction the disbursing officer's office was held, that office being held at Jamalpur. We may here observe that although the

(1) (1878) 3 C. L. R. 30.

(2) (1884) I. L. R. 6 All. 243..

(3) (1868) 2 B. L. R. (A. C.) 108 ; 10 W. R. 447.

previous attaching order was made without jurisdiction, we understand from the learned counsel for the Railway Company that the money attached has not been paid to the judgment-debtor, but is still held in deposit, and would be available for the decree-holder if only the attachment is made in due form by the decree being sent down for execution to the Calcutta Small Cause Court.

The second question in the reference has in effect been already answered, that question being whether in such cases such Court is competent to serve through the Small Cause Court, Calcutta, the attachment order named in paragraphs 4 and 5 of section 268 of the Code of Civil Procedure, on the disbursing officer having his office in the town of Calcutta, and the said disbursing officer on receipt of such order is bound to give effect to the orders of the Court. It the attachment is of salary to fall due and is to be made in the manner indicated in section 268, which we have already referred to, the attachment itself could not be made by the Gobindapur Small Cause Court without the decree being transferred for execution to the Court of Small Causes at Calcutta.

The third question is whether "when the salary of a Railway servant working within the local jurisdiction of a Court has been ordered to be attached in execution of a Small Cause Court decree passed by such Court, and when the disbursing officer has given effect to such attachment by recovering the decree money from a Railway servant and holding in deposit the same amount, such Court is competent to order the disbursing officer to pay the attached amount into the Court (to remit the amount by postal money-order) and if any such order is made and duly served upon such disbursing officer, whether the latter is bound to carry it out."

To the third question stated in the reference our answer is this: that the disbursing officer when he submitted to the order for attachment did so under a mistake of fact, namely, that the order had really emanated from the Calcutta Small Cause Court, which has jurisdiction in the matter. But when he was informed that the order did not really emanate from that Court, but proceeded from the Gobindapur Court, which has no jurisdiction over him, he was justified in not remitting the money to the Gobindapur Court. But as we are informed by the learned counsel for

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the Railway Company, and as we have already observed above, the money is still in deposit with the disbursing officer, and will be available for the decree-holder if only the attachment is made in due form by the decree being transferred to the Small Cause Court at Calcutta for execution.

M. N. R.

## APPELLATE CIVIL.

1908  
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 March 27.

PASUPATI NATH BOSE

v.

NANDO LAL BOSE.*

Execution of decree—Decree declared void as against one of the parties, effect of—Fraudulent decree.

A brought a suit for partition against B and C, and obtained a decree by consent, based upon the award of certain arbitrators. C subsequently brought a suit for a declaration that the award and the decree were fraudulent and void as against her. The suit was decreed in her favour. On an application for the execution of the decree by A against B, objection was taken by the latter on the ground that, inasmuch as the decree was declared to be fraudulent and void as against C, it was not susceptible of execution:—

Held, that as the decree was declared fraudulent and void as against C only, it was a subsisting decree between A and B and was susceptible of execution.

Bhimaji Govind Kulkarni v. Rakmabai (1) and *Natesa Ayyar v. Annasami Ayyar* (2) referred to.

APPEAL by Pasupati Nath Bose, the judgment-debtor.

This appeal arose out of an application for execution of a decree. Nando Lal Bose brought a suit for partition against his brother, Pasupati Nath Bose, his sister-in-law, Sreemutty Nistarini Dassi, and others in the Subordinate Judge's Court at Alipore. The matter was referred to arbitration of certain gentlemen, and by consent of parties, on the 12th September 1899, it was ordered by the Subordinate Judge that the award of the

* Appeal from order No. 509 of 1900, against the order of Ram Gopal Chaki, Subordinate Judge of 24-Perganas, dated Dec. 5, 1900.

(1) (1895) I. L. R. 10 Bom. 338.

(2) (1901) I. L. R. 25 Mad. 426.

arbitrators be filed in the Court and the same be confirmed as a decree of the Court. Under the award Nando Lal Bose was to obtain a certain sum of money from Pasupati Nath Bose as owelty. Subsequently Sreemutty Nistarini Dassai brought a suit on the Original Side of the High Court, claiming to have the award and decree set aside as fraudulent and of no effect as against her. That suit came on for hearing before Mr. Justice Stanley, who declared that the award and decree were fraudulent and void as against the plaintiff, Nistarini Dassai, and that decision was confirmed on appeal.

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Nando Lal Bose, the decree-holder, then applied to the Subordinate Judge of 24-Perganas for realization of a certain sum of money which was decreed in his favour by virtue of that award, as against the judgment-debtor, Pasupati Nath Bose. Pasupati objected to the execution of the decree mainly on the ground that, inasmuch as the decree was set aside by the High Court as fraudulent, it was no longer capable of being executed. The Court of first instance overruled the objection and allowed the execution to proceed.

Dr. Ashutosh Mookerjee (Babu Jnanendra Nath Bose with him). The Court below was wrong in allowing the execution to proceed, the decree having already been set aside as against one of the defendants, as fraudulent. It was a partition decree. A partition decree inures to the benefit of all the parties to the suit. If it is of no avail against one of the parties, it is ineffectual as against the others.

Babu Dwarka Nath Chuckerbutty for the respondent. There is no difficulty in executing the decree. Where a decree of a Court is set aside as against one of the parties only, the result of it is not that it is set aside as against the others. The cases of *Bhimaji Goind Kulkarni v. Rakmabai*(1) and *Natesa Ayyar v. Annasami Ayyar*(2) support my contention.

Dr. Ashutosh Mookerjee in reply.

MACLEAY C. J. This is an appeal from the order of the Subordinate Judge of the Second Court of Alipore, dated 5th of

(1) (1885) I. L. R. 10 Bom. 338.

(2) (1901) I. L. R. 25 Mad. 426.

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December 1900, under which he allowed execution to proceed as between Nando Lal Bose, who is the decree-holder, and Pasupati Nath Bose, who is the judgment-debtor, and the present appellant. By a consent decree dated the 12th of September 1899, it was ordered that the award of certain arbitrators, which is referred to in the decree, be filed in the Court, and the same be confirmed as a decree passed by the Court. That decree was passed in a suit instituted in the Alipore Court between Nando Lal Bose as plaintiff and his brother, Pasupati Nath Bose, as the first defendant, and Sreemutty Nistarini Dassi as the second defendant, and there were other defendants to whom I need not particularly refer. Subsequently Nistarini Dassi brought a suit on the Original Side of this Court, claiming to have the award and the decree, which I have mentioned, set aside as fraudulent and of no effect as against her. That suit was heard before Mr. Justice Stanley, who declared that the award and the decree were fraudulent and void as against the plaintiff and not binding upon her. Nando Lal Bose appealed against that decision, but it was ultimately confirmed by this Court. Therefore the position is this: the decree as against Nistarini Dassi is not binding upon her, having been declared to be fraudulent and void as against her. Then Nando Lal Bose proceeds to execute the decree as against Pasupati Nath Bose, but the latter says that, inasmuch as the decree has been declared to be fraudulent and void, the decree altogether must be taken to be so, and therefore it is not susceptible of execution, and that the execution proceedings ought not to go on.

I do not think that argument ought to prevail. The decree has only been declared fraudulent and void as against the plaintiff, Nistarini Dassi, but as between the two brothers, Nando Lal Bose and Pasupati Nath Bose, it remains intact, and if it remains intact as between them, it is difficult to see why Nando Lal Bose should not be entitled to execute it. This view seems to be consistent with the view expressed in the case of *Bhimaji Gorind Kulkarni v. Rakmabai*(1) and the English case there referred to. It is also, I think, consistent with the principle laid down in the case of *Natesa Ayyar v. Annasami Ayyar*(2).

(1) (1885) I. L. R. 10 Bom. 338.

(2) (1901) I. L. R. 25 Mad. 426.

It is urged that this principle ought not to apply, having regard to the fact that the decree was a partition-decree, or had the effect of a partition-decree. That does not seem to me to affect the principle: it may lead to complications, but those, perhaps, would arise whichever way we decide the point.

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The decree is a subsisting decree between the two brothers, and, if subsisting, is susceptible of execution.

On these grounds the appeal fails and must be dismissed with costs.

MITRA J. I concur.

Appeal dismissed.

S. C. G.

CRIMINAL REVISION.

W. R. FINK

v.

THE CORPORATION OF CALCUTTA.*

1903
May 21.

Receiver—Party to Criminal Proceedings—Leave of Court—"Owner"—Calcutta Municipal Act (Bengal Act III of 1899) ss. 3, 320, 574.

A Receiver appointed by the High Court is not the "owner" of the property of which he has been appointed Receiver, within the meaning of s. 3, cl. (32) of Bengal Act III of 1899; nor can he be made a party to any suit or proceeding without the leave of the Court appointing him.

Dunne v. Kumar Chandra Kisore (1) referred to.

RULES granted to the petitioner, W. R. Fink.

These Rules were issued calling upon the Municipal Magistrate of Calcutta to shew cause why the order fining the petitioner should not be set aside on the ground that the petitioner being a Receiver appointed by the High Court, no order could be made against him under the provisions of ss. 320 and 574 of the Calcutta Municipal Act of 1899.

* Criminal Revision Nos. 347 and 348 of 1903 against the order of P. N. Mookerjee, Municipal Magistrate, Calcutta, dated March 18, 1903.

(1) (1902) I. L. R. 30 Calc. 593; 7 C. W. N. 390.

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On the 13th September 1901, the petitioner was appointed by the High Court, in suit No. 450 of 1900, Receiver of the immoveable properties appertaining to the estate of Haji Cassim Ariff, deceased, consisting of, amongst others, the premises Nos. 220 to 232, Old China Bazar Street in Calcutta.

On the 22nd November 1902 the petitioner received from the Corporation of Calcutta a notice dated the 2nd November 1902, requiring him within twenty days to execute certain works in connection with those premises. The petitioner thereupon caused the premises to be examined and an estimate prepared of the work required to be done, and having found that such estimate amounted to a larger sum than he was authorised to spend, he circulated the estimate among the parties to the suit with a view of obtaining an order from the Court authorising him to incur the necessary expenses, but the parties were unwilling to do this. On the 16th March 1903 the petitioner received two summonses from the Municipal Magistrate of Calcutta, one calling upon him to answer to a charge under s. 574 of Bengal Act III of 1899 for failing to comply with the requisitions of a notice under s. 320 (1) (a) of the Act, to remove the service privies on the premises Nos. 220 to 232 Old China Bazar Street, and the other for failing to comply with a notice under s. 320 (1) (b) of the Act to replace the spouts and relay the house drainage system of the said premises. No sanction was obtained by the Corporation from the High Court before taking proceedings against the petitioner.

On the 18th March 1903 the Municipal Magistrate of Calcutta passed an order imposing a fine of Rs. 10 on the petitioner in each case.

Mr. O'Kinealy (Babu Bhupendra Nath Bose and Babu Charu Chandra Ghose with him) for the petitioner. S. 320 of the Calcutta Municipal Act requires that notice should be given to the "owner" of the premises; the word "owner" is defined by s. 3, cl. (32) of that Act. The Receiver is not an "owner" within the meaning of that section. He is an officer of the High Court and receives the rents of the property in that capacity, as manager of the property on behalf of the Court. He receives no rent on his own account or as agent for any one.

The order appointing him Receiver does not authorise him to incur the expenditure required by the Municipality without the sanction of the Court. He cannot be made a party to any suit or proceeding without the leave of the Court: see *Dunne v. Kumar Chandra Kisore*(1). In the present case no leave has been obtained by the Corporation.

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Mr. A. Chaudhuri, Babu Dwarka Nath Chakravarti and Babu Joy Gopal Ghose, for the Corporation, shewed cause. It has been held in England that a Receiver appointed by the Court is not an "owner" within the meaning of s. 4 of the Public Health Act of 1875 (38 & 39 Vict. c. 55): *Corporation of Bacup v. Smith*(2). The definition of the word "owner" in the Calcutta Municipal Act closely follows the wording of the English Act. The case of *Dunne v. Kumar Chandra Kisore*(1) deals only with the proceedings under s. 145 of the Criminal Procedure Code, and is therefore distinguishable.

RAMPINI AND HANDLEY JJ. These are two Rules obtained on behalf of Mr. W. R. Fink, Receiver of the estate of one Haji Cassim Ariff, deceased, calling upon the Municipal Magistrate to show cause why the fines imposed on him under sections 320 and 574 of the Municipal Act should not be set aside.

The fines were imposed on him for not taking steps to close certain service privies and to make certain structural alterations in certain premises under his control as Receiver.

It is contended that the conviction of the appellant is bad, (i) because the appellant is not the "owner" of the premises; (ii) because the sanction of the Court had not been obtained to his prosecution; (iii) because the Receiver had not under his order of appointment the power to incur the expenditure required to carry out the orders of the Corporation; and (iv) because the appellant was doing all he could to obtain funds from the Court to enable him to comply with the notices.

We think the Rules must be made absolute on these grounds. Mr. Fink as Receiver is not the owner of the premises within the definition of the term as contained in the Municipal Act. He

(1) (1902) I. L. R. 30 Calc. 593; (2) (1890) L. R. 44 Ch. D. 395.

7 C. W. N. 390.

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may be receiving rent for the premises, but he does not receive it "on his own account or as agent or trustee for any person or society or for any religious or charitable purpose." He receives the rent as an officer of this Court and as manager of the property on its behalf.

Then, in the case of *Dunne v. Kumar Chandra Kisore*(1) and others, it has been decided that a Receiver cannot be made a party to any suit or proceeding without the leave of the Court appointing him.

Finally, on the merits we have satisfied ourselves by examining Mr. Fink's letter of appointment that it was not within Mr. Fink's power to incur the expenditure required of him without the sanction of the Court, and that he has been doing all he can to collect the necessary funds so as to enable him to comply with the requisition of the Corporation after obtaining the sanction of the Court to his doing so.

For these reasons we make these Rules absolute; the fines if paid will be refunded.

Rules absolute.

D. S.

(1) (1902) I. L. R. 30 Calc. 593; 7 C. W. N. 390.

PRIVY COUNCIL.

BALABUX

v.

RUKHMABAI.

P.C.*
1903March 18,
April 29.

[On appeal from the Court of the Judicial Commissioner,
Hyderabad Assigned Districts.]

*Hindu Law—Partition—Transactions amounting to partition or separation—
Reunion—Agreement to reunite—Minor—Presumption when one co-parcener
separates himself—Agreement to remain united—Mitakshara Law.*

According to the text of Vrihaspati (Mitakshara Ch. II, s. 9) a reunion in estate properly so called can only take place between persons who were parties to the original partition.

Semle: An agreement to reunite cannot be made on behalf of a person during his minority.

There is no presumption when one co-parcener separates from the others that the latter remain united. Where it is necessary, in order to ascertain the share of the outgoing co-parcener, to fix the shares which the others are, or would be, entitled to, the separation of one may be said to be the virtual separation of all. And an agreement amongst the remaining co-parceners to remain united or to reunite must be proved like any other fact.

In this case, in which the appellant claimed to be entitled on the death of his uncle in 1883 to the property of a joint family by right of survivorship, one of the members had admittedly separated himself in 1869, and no agreement by the other members to remain united or to reunite had been proved, and upon the circumstances of, and evidence in, the suit it was held by the Judicial Committee that the appellant had not sufficiently established the state of jointness between himself and his uncle, which was necessary to make his claim successful; and that even had it been established, transactions in 1889 settled with the appellant's knowledge and consent amounted to a division amongst the members of the family which would defeat his claim.

APPEAL from a decree (4th April 1898) of the Judicial Commissioner, Hyderabad Assigned Districts, reversing a decree

* *Present:* Lord Davey, Lord Robertson, Sir Andrew Scoble and Sir Arthur Wilson.

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(26th March 1898) of the Civil Judge of the Ellichpur District who had granted the relief prayed for in the appellant's suit.

The plaintiff, Balabux, appealed to His Majesty in Council.

The facts were as follows :—

One Amarchand had four sons—Chatturbhuj, Girdhari Lall, Kanyaram and Ladhuram, who formed a joint Hindu family. Chatturbhuj became separated during his father's lifetime and died about 1869. The present litigation only concerns the other members of the family. Girdhari Lall married Rukhmabai, by whom he had a daughter, Denbai. Kanyaram had a son, Luchminarayan, and Ladhuram married Birjubai and had a son, Balabux, the present plaintiff. Amarchand very many years ago settled in the town of Ellichpur, where he carried on business in the name and style of Amarchand-Girdhari Lall, and he died there about 1858. At his death and up to 1869 his sons, Girdhari Lall, Kanyaram and Ladhuram continued joint. In that year Kanyaram separated and started a separate business of his own in the name of Kanyaram-Luchminarayan. In October 1872 Ladhuram died at Allahabad. His widow, Birjubai, and his son, the plaintiff, then returned to Ellichpur, where they continued to live in the ancestral house, being supported from the profits of the business of Amarchand-Girdhari Lall. The plaintiff was born on 26th March 1869, and was thus 3½ years old at the time of his father's death. Girdhari Lall died about 1882. After his death the business was carried on by his widow, Rukhmabai, and the plaintiff's mother, Birjubai, until 1894.

In January 1889 the business was divided into two portions, and two separate shops were started, each with one-half of the assets of the original firm. The new shops were known as Amarchand-Girdhari Lall and Amarchand-Ladhuram. The former was placed under the management of Rukhmabai, and the latter under the management of Birjubai.

The main questions raised in this appeal were whether the plaintiff was joint in estate with his uncle, Girdhari Lall, at the death of the latter in 1882; and as to what was the effect of the division of the property in 1889.

About the year 1892 Rukhmabai appointed one Badri Narayan the manager of the share of the business under her control. He

took up a position adverse to the plaintiff and, it was alleged, misappropriated funds. The plaintiff did not interfere much personally in the management of the business; but on learning the conduct of the manager, he claimed the control of that half of the business: this was resisted, and in 1894 Rukhmabai left the ancestral house and took away with her with the assistance of her brother, Motiram, a safe containing about Rs. 10,000, certain securities, and some jewellery.

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Shortly after, on 20th August 1894, the plaintiff instituted the suit out of which the present appeal arose. The plaint alleged that Ladhuram and Girdhari Lall were joint in estate until the death of the latter in 1872, and that the plaintiff continued joint with Girdhari Lall until 1882 when Girdhari Lall died; that on Girdhari Lall's death the plaintiff was a minor and the business was managed by Rukhmabai and Birjubai, and that in consequence of disputes between them, the business was divided in 1889. The plaint challenged the right of Birjubai to make the division, and referred to the mismanagement of the half under Rukhmabai's control; to the refusal to deliver possession of it to the plaintiff in July 1894; and to the removal of the safe, and stated that Motiram was helping Rukhmabai to prevent the plaintiff from obtaining possession of the property, and was in possession of the safe, in consequence of which he was made a defendant. The relief claimed was a declaration that the plaintiff was the owner of the business carried on in the name of Amarchand-Girdhari Lall, and for possession of the assets of the firm, including the safe and its contents, which were in possession of the defendants.

The defence raised the following points:—That up to 1869 Girdhari Lall, Kanyaram, and Ladhuram were undivided and were the joint owners of the business of the firm of Amarchand-Girdhari Lall; that in 1869 there was a complete separation between the brothers, after the partition Ladhuram starting a shop at Bhorteda in Marwar, nothing being known of his assets, and Girdhari Lall alone then becoming the owner of the business known as Amarchand-Girdhari Lall; that on Ladhuram's death, in 1872, Girdhari sent for the plaintiff and his mother and supported them; that before his death Girdhari Lall verbally directed

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Rukhmabai to give one-half of the property to the plaintiff, and in 1889 she, in pursuance of this request, divided the property and gave one-half of it to the plaintiff; that the division was final under any circumstances and the suit barred by limitation; that the safe did contain Rs. 10,000 and was removed, but the money did not belong to the firm; and that even if Girdhari Lall had died joint in estate with Ladhuram and the plaintiff, yet Rukhmabai was entitled to possession of Girdhari Lall's half share by special custom of the Khandebral Marwadees to which caste the parties belonged.

On the pleadings issues were settled, of which the following only are now material:—

(1) Was a partition made between Girdhari Lall and his two brothers in 1869?

(2) If so, on what terms, if any, were the plaintiff and his mother taken back into Girdhari Lall's house after Ladhuram's death? And what is the effect of such union?

(3) Was the division between plaintiff's mother and defendant No. 1 in 1889 a temporary family arrangement made with the mere object of avoiding domestic quarrels?

(4) Was the division made without the plaintiff's consent?

(5) What are the legal consequences of this arrangement, and is the plaintiff at liberty to impeach it?

The Civil Judge of Ellichpur, on the issue as to whether Girdhari Lall and the plaintiff constituted a joint undivided family at the death of the former, decided as follows:—

"Reading the whole mass of evidence together, it appears that there was a partition between Girdhari and his two brothers in 1826 (1869). But it is an admitted fact that soon after the said partition the plaintiff and his mother were brought back to Girdhari's house, and there was union in them some years before Girdhari died, and the reunion continued for some years after Girdhari died; so the effect of this reunion must be taken as cancelling the first division between them."

He then held that the division of 1889 was not a regular and complete partition, but a family arrangement made without the plaintiff's consent, and which he was at liberty to impeach. He was of opinion that Motiram, the second defendant, was acting in collusion with the first defendant, Rukhmabai, and therefore granted the relief prayed for in the plaint against both defendants.

The Judicial Commissioner held that there was no evidence that there was no division between Girdhari Lall and Ladhuram; that there was complete partition of all property of every sort in 1869; that after this partition Girdhari Lall and Ladhuram agreed to carry on only the trade business of the firm of Amarchand-Girdhari Lall in partnership; and that Ladhuram died as joint owner of one-half of this business with Girdhari Lall, being separate from him in every other respect. The Judicial Commissioner was also of opinion that the division of 1889 was confined to the business of the firm, and was really a dissolution of partnership between Rukhmabai and Balabux with the full knowledge and consent of the latter. The material portions of his judgment were as follows:—

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"The most important question is, whether there ever was a division between Girdhari Lall and Ladhuram. For defendant it is argued and authorities are shown to prove that it has been determined if one out of several brothers (co-parceners) be separated from the rest, it is a virtual separation of all; and although the remaining brothers continue still to live jointly, they must be considered to have reunited because shares must have been apportioned to all to ascertain the share of the one. Plaintiff then says that after Kanyaram separated, his father and Girdhari Lall reunited. To arrive at a correct decision it is important to consider carefully what happened in January 1889. Now plaintiff never alleged that the division was unequal; on the contrary, when examined as a witness, he said that to avoid quarrel, each took half. Plaintiff got Rs. 55,071 and defendant No. 1 got Rs. 54,833, plus a set-off for a small sum. The evidence of plaintiff's own witness, Juggannath, is very important. It is quite clear from the evidence of witnesses, and from the documentary evidence and books, that there was a very careful partition or division of the debts and assets of the firm into two equal parts, two shares as equal as possible."

After pointing out that the evidence showed this and that it was done with the knowledge and consent of the plaintiff, the judgment continued:—

"That there was no division or partition between plaintiff's father and Girdhari Lall there is no evidence; if there was a partition it is alleged that they reunited. That this was a fact is not proved. In support of the story of a temporary splitting up of the shop and giving portions into the management of each widow for the benefit of the plaintiff till he should be old enough to look after the business himself, there is no evidence of any value. Long arguments have been made use of, founded on straws, such as the entries of 'Wahipuja' in the books; but there is ample evidence to prove that a friend or relation or even an outsider may make such entries. Plaintiff relies a good deal on the evidence of his witness, Juggannath, his own agent or servant, who has been obliged to make admissions most damaging to plaintiff's case. It is argued for plaintiff that if there was a division of 1870-71 (1927) why should there

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be another division in 1889. This is a point which tells much more in defendant's favour than in plaintiff's. It is admitted that in 1927 Kanyaram separated, and legally there was a partition between all the three brothers in order to find out that Kanyaram's share came to Rs. 11,000. It is argued for plaintiff that the *sakal bahi* for 1927 shows Kanyaram's share separate as Rs. 11,000 and Girdhari Lal's and Ladhuram's joint as Rs. 22,000, and that the fact that there was no division of houses, ornaments, household goods, pots and pans in 1889, proves that there was not a division in 1889. This is a strong argument really for defendant No. 1. The division of the family took place in 1870, and each family obtained its share of the ancestral property, and defendant No. 1 is in possession of the northern half of the house and one shed, and plaintiff is in separate possession of the southern half of the house and one shed, and they lived separate, with their own clothes, ornaments, pots and pans, etc., but were partners in trade, and it was the trade partnership which was dissolved in 1889, each getting half the assets and liabilities of the firm or shop, but there was no personal property, such as ornaments or pots and pans to divide. I do not think that the fact of the funeral obsequies expenses of Ladhuram being debited in the books of the firm prove anything, nor do the arguments about the firm of Amarchand-Ladhuram prove plaintiff's theory. The fact of plaintiff visiting both shops after January 1889, and making some entries in both shops' books after that date, proves nothing. Rukhmabai was his aunt and had not quarrelled then with the boy plaintiff, and plaintiff admits, and his own witness Juggannath says, that he (plaintiff) was learning how to keep shop books, so he might well learn a little by practice in defendant's shop without that making him the owner of the shop. The arguments of undue influence, insufficient knowledge of facts, natural disinclination to resist his mother's wishes, and absence of male friend to represent his interest are all a sort of appeal *ad misericordiam*, but are of no value in support of, or in disproof of, the allegations made by each side regarding what actually took place in 1889, and cannot entitle plaintiff now to repudiate what was done in 1889. The Judge of the Lower Court has fallen into some errors of fact, and I think that the decision arrived at was to a great extent based on the mistake of fact as to the plaintiff's minority, the Lower Court being under the mistaken belief that at the time of the arrangement in 1889 plaintiff was a minor, and that defendant No. 1 was in the position of his guardian. The Lower Court was, I think, also wrong in finding on the evidence and books that the division in 1889 was unequal and unfair. It was, I think, extremely equal and fair. I find that Girdhari Lal and Ladhuram separated in 1870-71 (1927), but then became partners in the firm of Amarchand-Girdhari Lal, Balabux taking the place of his father Ladhuram on Ladhuram's death in 1872 and Rukhmabai (defendant No. 1) taking Girdhari Lal's place on the latter's death in 1884. That the firm of Amarchand-Girdhari Lal continued till January 1889 with Rukhmabai and Balabux as the partners and owners; that in January 1889 the firm was dissolved and the partnership ended, each partner taking exactly half of the assets and liabilities as nearly as could be ascertained; and that from January 1889 Rukhmabai became sole owner of the firm of Amarchand-Girdhari Lal, and Balabux became sole owner of the firm of Amarchand-Ladhuram."

The Judicial Commissioner therefore reversed the decree of the Civil Judge, and dismissed the suit with costs.

On this appeal,

J. Jardine K. C. and *L. DeGruyther* for the appellant contended that on the evidence it was proved that Girdhari Lall and Ladhuram were members of a joint undivided family until the death of the latter in 1872. In 1869 Kanyaram had separated from his brothers, but the separation of one member of a joint family did not effect the separation of the remaining members. The presumption was that they remained joint until the contrary was proved. Reference was made to West and Bühler's Hindu Law, 3rd Edition, p. 685; Mayne's Hindu Law, 6th Edition, pp. 653, 773; *Upendra Narain Myti v. Gopee Nath Bera*(1), *Sudursanam Maistri v. Narasimhulu Maistri*(2); and as to the effect of one member parting with his share, *Balgobind Das v. Narain Lal*(3). Even if it were held that there was a separation between the three brothers in 1869 or 1870, it was submitted that there was a subsequent reunion between Girdhari Lall and the appellant, who, together with his mother, Birjubai, continued to live with Girdhari Lall until his death in 1882. The transaction of 1889 was shown by the evidence to have been merely a family arrangement between Rukhmabai and Birjubai to avoid disputes: there was no proof that that arrangement amounted to a dissolution of partnership between Rukhmabai and the appellant, as had been found by the Judicial Commissioner. Such a case was not disclosed by the pleadings, with which it was inconsistent, and it was, moreover, opposed to the evidence on the record.

R. Obbard for the respondent contended that the judgment of the Judicial Commissioner under appeal was right both as to the consideration of and weight given to the evidence, and also as having applied the correct presumptions and principles of law to the case. The appellant was suing for the possession of property admittedly in the possession of the respondent, and had to prove his title to it. This, it was submitted, he had not done. He had wholly failed to substantiate the material allegations of fact which it was necessary for him to prove to entitle him to a

(1) (1883) I. L. R. 9 Calc. 817, 823.

(2) (1901) I. L. R. 25 Mad. 149, 156.

(3) (1893) I. L. R. 15 All. 339; L. R. 20 I. A. 116.

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decree in such a case. Both Courts had decided that there was a partition between the three brothers in 1869 or 1870; and the evidence to show reunion was quite insufficient to prove that fact. The ascertainment of the share of a member of the family separating himself from the rest necessarily caused separation of a kind amongst the other members. Even if the separation in 1869-70 were considered to be not proved, the arrangement made in 1889 was, it was submitted, a separation on a permanent basis, and was not merely of the temporary character which the appellant attempted to give it. It was a settlement made with his knowledge and consent, and it must be taken to be binding on him, and could not now be set aside. The oral and documentary evidence was gone into at considerable length, and on the whole case it was contended that the judgment of the Judicial Commissioner should be upheld.

Jardine K.C. replied.

The judgment of their Lordships was delivered by

April 29.

LORD DAVEY. Prior to and in the year 1869 three brothers—Girdhari Lall, Kanyaram and Ladhuram—lived together as an undivided family and owned a shop which had been founded by their father, Amarchand, at Ellichpur, in the Hyderabad Assigned Districts. At some time in 1869 or 1870 (for the date is uncertain) Kanyaram separated from his brothers, took out his share, amounting to about Rs. 11,000, and started a shop of his own. There is no direct evidence of any agreement between Girdhari Lall and Ladhuram. Girdhari Lall's widow, Rukhmabai (who is the first respondent in the present appeal and will hereafter be referred to as the respondent), says she was at Ellichpur at the time of the separation and heard there was a document about their partition and that it had been prepared by a panchayet, but she does not know what has become of that document. And there is no further evidence whether any such document was signed or what were the contents of it, if any such document there were. There is also no evidence that Ladhuram drew out his share of the family property or any part of it, and the fair inference would seem to be that he left it in the family shop, which continued to be carried on by Girdhari

Lall under the firm name of Amarchand-Girdhari Lall. About the time of the partition Ladhuram sent his wife and infant son, the appellant Balabux, to reside in a place referred to as Bhorteda, and a few months afterwards he seems to have joined them there, and they then went together on a pilgrimage to Prayag (Allahabad), where he died in the year 1873. Thereupon Girdhari Lall brought the appellant's mother, Birjubai, and the appellant, then a lad of 13 or 14 years of age, to his residence in Ellichpur, and they lived with him there until his death in 1882. He left one daughter, but no male issue.

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After Girdhari Lall's death the two families continued to live together and the two widows managed the shop. Differences arose between the ladies, and in 1889 on the advice of friends the business was divided into two shops, one of which was carried on by the respondent for her own profit, the other being in like manner carried on by Birjubai for herself and the appellant. A complete and apparently exact division was then made of the stock-in-trade, book debts, and other assets of the business, and, according to the respondent, of the houses, the jewels in the house, and the utensils also, but this does not seem to be proved. The parties, however, continued to live in the family house, though whether they messed together is not clear, until 1894 when the final rupture took place and the respondent went to reside elsewhere. The appellant became of age on the 25th March 1887, but he seems to have been more studious of religious observances than of the care of the business, and he did not in fact give much attention to the business at any time, though there are entries in his handwriting in the books before the division in 1889 and even in the respondent's books after the division. It should be mentioned that expenses connected with Ladhuram's funeral ceremonies were paid out of the moneys of the business, and by agreement a sum of Rs. 4,000 was allowed at the time of the division in 1889 for the marriage expenses of Girdhari Lall's daughter.

In the present suit the appellant claims, as the survivor of a joint family, consisting of his uncle Girdhari Lall and himself, to be sole owner of the family shop and business, and treats the division in 1889 as an arrangement for management only to avoid

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quarrels and as a matter of convenience; and he suggests that it was made by his mother and his aunt before he was perfectly able to understand things.

The respondent's story was that there was a complete separation between the brothers in 1869, and that Ladhuram took out his one-third share and set up a shop of his own at Bhorteda, and the family shop in Ellichpur thereupon became the separate property of Girdhari Lall. She further said that after Ladhuram's death Girdhari Lall out of charity and family affection brought the appellant and his mother to his own house and maintained them, and before his death verbally directed her to give the appellant one-half of the property, which she had done by the division in 1889. There is, however, no evidence that Ladhuram drew out his third share or set up a shop of his own in Bhorteda or elsewhere, and the one fact which is clear in this cloud of uncertainty is that Girdhari Lall in his lifetime never treated himself as the sole owner of the business.

The question for consideration therefore is, what was the nature and legal effect of the transactions which took place in 1869 or 1870 and 1889? The Civil Judge of Ellichpur was of opinion that, reading the whole mass of evidence together, it appeared that there was a partition between Girdhari Lall and his two brothers in 1869, but that there was union between the present appellant and his mother and Girdhari Lall, some years before the latter died, so the effect of this reunion must be taken as cancelling the first division between them. The learned Judge also held that the division in 1889 was made as a family arrangement only, and without the consent of the appellant, who was therefore at liberty to impeach it. He therefore made a decree in the appellant's favour. Their Lordships are of opinion that the learned Judge's view as to the reunion after the death of Ladhuram cannot be supported, and indeed it was not maintained by the appellant's counsel. A reunion in estate properly so called can only take place between persons who were parties to the original partition. This appears to be the meaning placed on the well known text of Vrihaspati (Mitakshara, Ch. 2, Sec. 9):—"He who being once separated dwells again through affection with his father, brother, or paternal uncle is termed reunited." It is difficult also to see

how an agreement for that purpose could have been made by or on behalf of the appellant during his minority.

The Judicial Commissioner also held that Girdhari Lall and Ladhuram separated in 1869 or 1870, but he held that they then became partners in the firm of Amarchand-Girdhari Lall, the appellant taking the place of his father on Ladhuram's death, and the respondent taking Girdhari Lall's place on the latter's death. He further held that the firm of Amarchand-Girdhari Lall was dissolved in January 1889, each partner taking half of the assets and liabilities as nearly as could be ascertained, and from that date the respondent became sole owner of the firm of Amarchand-Girdhari Lall, and the appellant became sole owner of the firm of Amarchand-Ladhuram. By his decree dated the 4th April 1899 (which is the decree under appeal) the Judicial Commissioner accordingly dismissed the appellant's claim with costs in both Courts.

There is therefore a concurrent finding that there was a partition between all three brothers in 1869 or 1870. The Judicial Commissioner's opinion on this point, however, seems to be based more on the legal inference to be drawn in the absence of any direct evidence of the actual agreement between Girdhari Lall and Ladhuram than on a consideration of evidence. Their Lordships, therefore, think it will be more satisfactory for them to state their own reasons for agreeing with the Judicial Commissioner. There is no doubt some evidence both of a continued union between Girdhari Lall and Ladhuram and against it. On the one hand, the absence of any proof of an actual division of property between Girdhari Lall and Ladhuram and the fact of the former having taken the appellant and his mother back to the ancestral home are evidence of the two brothers having agreed to remain united. On the other hand, the fact of Ladhuram having sent his wife and child to reside at Bhorteda and himself leaving the ancestral home (though it is said for a pilgrimage only), and the evident and expressed desire of Girdhari Lall, concurred in by the appellant and his mother until 1894, that the appellant should be treated as entitled to one-half the business and property, is evidence in the contrary direction. But the evidence either way is too slight to form a satisfactory basis for decision. What then

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is the result? It appears to their Lordships that there is no presumption when one co-parcener separates from the others, that the latter remain united. In many cases it may be necessary, in order to ascertain the share of the outgoing member, to fix the shares which the other co-parceners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all. And their Lordships think that an agreement amongst the remaining members of a joint family to remain united or to reunite must be proved like any other fact. They agree, therefore, with the Judicial Commissioner on this part of the case, and they think that his inference of a partnership between Girdhari Lall and Ladhuram and afterwards the appellant, either by express agreement or by operation of law, is the hypothesis which best reconciles all the proved facts in the case.

The Judicial Commissioner has very carefully considered and stated the effect of the evidence as to the division in 1889. With the assistance of counsel their Lordships have examined the evidence, both oral and documentary, upon which the learned Commissioner's finding is based, and they agree with him as to the result of it. They need not therefore repeat what he has said. They find that the plaintiff was of age and was present and took an active part in the arrangement then made, and that a careful and exact division was made of the assets and liabilities of the former firm between the two new firms. There is evidence also that the house in which the appellant and respondent resided was divided, the respondent taking the northern portion and the appellant and his mother the southern portion, but it is not quite clear to what period the division should be referred. Their Lordships also think that the Judicial Commissioner was right in not attaching any importance to the fact of the Wahipuja having been performed by the appellant in the respondent's shop or his having visited her shop and even made entries in her books. It appears from other evidence that the appellant and respondent remained on friendly terms until the commencement of the present suit.

Their Lordships therefore are of opinion that the transaction of 1889 was a dissolution of the partnership theretofore subsisting

between the appellant and the respondent as heir and representative of Girdhari Lall; and even if they took a different view of what took place in 1869 or 1870, they would hold that the arrangement made in 1889 was not, as alleged by him, of a merely temporary character, but was intended to be a permanent family settlement, and in the circumstances cannot be impeached by, and is binding upon, him.

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They will therefore humbly advise His Majesty that the appeal be dismissed, and the appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellant: *Hughes & Sons.*

Solicitors for the respondent: *Howard Woolley & Co.*

J. V. W.

P. C.*
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March 24.
April 29.

BALKISHEN DAS

v.

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[On appeal from the High Court at Fort William in Bengal.]

Hindu Law—Partition—Requisites for Partition—Deed defining and allotting shares—Effect on deed of subsequent conduct of the parties—Effect of deed as regards minor members of the joint family—Reunion of member after once separating himself.

An ikarnama executed by the members of a joint family, some of whom were minors, stated in unambiguous terms that defined shares in the whole joint property had been allotted to the several co-parceners, and also gave liberty to any of the parties to it "either to live together as a member of the joint family as before or to separate his own business":—

Held, that the effect of the deed was to cause a separation in estate and interest between all the co-parceners. The clause giving the parties the option of being joint or separate was not inconsistent with a separation in estate. It conferred on the parties no larger liberty of choice than they would have had without it. They might elect either to have a partition of their shares by metes and bounds or to continue to live together and enjoy their property in common as before. Whether they did one or the other would affect the mode of enjoyment, but not the tenure of the property or their interest in it, which was, on the principle of the case of *Appovier v. Rama Subba Aiyar* (1), determined by the allotment to them of defined shares by the ikarnama.

The legal effect of the ikarnama could not be controlled or altered by evidence of the subsequent conduct of the parties; but such conduct in this case was not inconsistent with an intention to subject the whole property to a division of interest, although it was not immediately to be perfected by an actual partition.

Held, also, that the ikarnama was binding on the minors. It followed from the admitted right of any co-parcener to claim partition that a valid agreement for partition could be made during the minority of one or more of the co-parceners. If it was unfair or prejudicial to their interests, the minors could by proper proceedings on attaining majority set it aside so far as it concerned themselves.

Quære: whether in Bengal a member of a joint family once separated can reunite only (according to the text of Vrihaspati quoted in the *Mitakshara*, Ch. II, s. 9) with a father, brother, or paternal uncle.

APPEAL from a decree (6th December 1897) of the High Court at Calcutta, affirming a decree (18th January 1896) of the Subordinate Judge of Muzaffarpur in favour of the respondents.

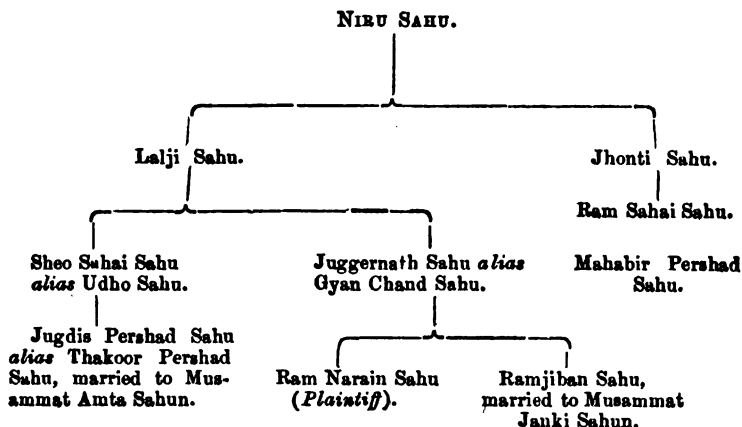
* *Present*: Lord Davey, Lord Robertson, Sir Andrew Scoble and Sir Arthur Wilson.

(1) (1866) 11 Moo. I.A. 75.

The defendants, Balkishen Das and others, appealed to His Majesty in Council.

The suit was brought by the respondent, Ram Narain Sahu, to establish his right by survivorship to certain property which had been seized by the defendants 1 to 3, Balkishen Das, Shyam Das, and Mathura Das, as being the property of the defendants 4 and 5, Janki Sahun and Amta Sahun, the widows respectively of Ramjiban Sahu and Jugdis Pershad Sahu, otherwise Thakoor Pershad Sahu, members of an undivided family, governed by the Mitakshara law in which the respondent claimed joint membership.

The following genealogical table, which is referred to in their Lordships' judgment, shows the relationship of the parties:—



Lalji Sahu survived both his sons and died on the 27th December 1882, leaving three grandsons, of whom Thakoor Pershad and Ram Narain (the plaintiff) were minors. On 24th April 1883 Bhago Sahun, the mother and guardian of Ram Narain, and Mauli Sahun, mother and guardian of Thakoor Pershad, applied for a certificate under Act XXVII of 1860 to collect the debts due to the estate of Lalji Sahu. In their petition they stated that Ramjiban, who was of full age, was about to waste the estate of the minors. This petition was opposed by Mahabir Pershad on the ground that the family was joint, and on 21st June 1883 an ikrarnama or partition deed was executed between all parties by which shares in the property were defined and allotted,

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vis., a 4-anna share to Mahabir Pershad, a 6-anna share to Thakoor Pershad, and a 3-anna share each to Ramjiban and Ram Narain. The material portion of this document is set out in their Lordships' judgment.

In June 1883 a petition was filed by Bhago Sahun on behalf of Ram Narain, and Mauli Sahun on behalf of Thakoor Pershad, for a certificate to be granted to them as representing a 9-anna share of Lalji Sahu's property. Mahabir also put in a petition for a certificate. On 28th July a joint certificate was issued in favour of the four sharers.

Thakoor Pershad died in 1886, and in the same year his widow, Amta Sahun, filed a petition for review of the order granting the above certificate. A counterpetition, dated 2nd December 1886, was put in by Ramjiban and Bhago Sahun as representing the minor, Ram Narain, in which it was represented that the family was still joint except as regarded Mahabir. Ramjiban died in 1887, leaving a widow, Janki Sahun. Ram Narain attained majority in 1890.

In May 1887 a suit was brought by Hari Das, then representing the present appellants' money-lending firm at Benares, against Janki Sahun, Amta Sahun, and Ram Narain (then a minor) to recover money due on an account stated in 1886 in reference to a debt due on a mortgage executed by Lalji Sahu on 24th May 1869; and in that suit a decree was made against all the then defendants for Rs. 7,427. On an appeal to the High Court the decree so far as concerned Ram Narain was set aside. The representatives of Hari Das, who had died during the last-named proceedings, then took out execution against the properties which had formed the shares of Thakoor Pershad and Ramjiban, upon which Ram Narain objected that their interests had passed to him. This objection was disallowed by the Court on 1st September 1894, and the property was advertised for sale on 15th January 1895.

On 6th January 1895 Ram Narain instituted his suit against the defendants 1 to 3 as representing the judgment-creditors, and Janki Sahun and Amta Sahun, the defendants 4 and 5, the widows of Ramjiban and Thakoor Pershad, as judgment-debtors, claiming that the properties should be released from execution

on the ground that as the family was joint, the interests of the husbands of the two ladies had vested in him by survivorship. He relied on two documents. One was a *razinama* or compromise dated 24th January 1889, alleged by Ram Narain to have been made between himself and Amta Sahun in a suit brought by him against her. By this document he agreed to leave her in possession of a considerable amount of property for her life and to pay her Rs. 1,300. It purported to be signed by her am-mokhtar while she was a minor under the guardianship of her mother-in-law, Mauli Sahun. The other document was a *sulehnama* dated 26th July 1890, purporting to have been executed by Janki Sahun, in which she admitted that her husband had lived jointly with Ram Narain, and that on his death the latter had entered into possession by survivorship. It was signed for Janki Sahun by an am-mokhtar.

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The judgment-creditor defendants in their written statement set up the deed of partition of 21st June 1883, and asserted that under it the shares of Thakoor Pershad and Ramjiban passed to their widows.

The defendant Amta Sahun, who was still a minor, pleaded that she knew nothing of any decree against her.

The defendant Janki Sahun alleged that her husband died separate in estate, and that she knew nothing of the alleged document of 26th July 1890.

The issues raised on the pleadings were:—

(i) Is plaintiff's allegation of title by survivorship and possession true?

(ii) Whether the husbands of the judgment-debtor defendants were separate from plaintiff at the time of their respective deaths?

The Subordinate Judge held, on the terms of the *ikrarnama* of 21st June 1883 and upon the oral evidence, that the deed only operated to effect a separation with Mahabir, the other members of the family remaining joint. His decree was therefore in favour of the plaintiff.

The defendants appealed to the High Court, a Division Bench of the Court (TREVELYAN and GHOSE JJ.) affirming the decree of the Subordinate Judge. The material portions of the

1908 judgment of the High Court were as follows:—(As to the
 BALKISHEN ikrarnama of 21st June 1883 they said)—
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“With reference to this document, we may say that if it stood alone without any other evidence—evidence of the conduct of the parties concerned about the time of this transaction and subsequent thereto—we should have to declare in accordance with the decision of the Privy Council in the case of *Appovier v. Rama Subba Aiyar*(1) that there was a separation in estate between all the parties concerned, though at the time there was no partition by metes and bounds. But, as laid down by the Judicial Committee in the case of *Doorga Pershad v. Kundan Koovar*(2), the question in every case like this is one of intention, namely, whether the intention of the parties, to be inferred from the instruments which they had executed and the acts they had done, was to effect a division such as to alter the status of the family. We have examined the evidence in this case with reference to this question of intention, and we think there can be very little or no doubt that the real object which Ramjiban, who was then the managing member of the family, had (Thakoor Pershad and Ram Narain being minors at the time) was to give Mahabir Pershad Sahu, who then claimed an eight-anna share of the estate as small a share as possible and to separate him from the rest of the family; and that was effected by the deed of ikrarnama. Looking at that document as a whole, and reading it by the light of the evidence of the conduct of the parties, one cannot help coming to the conclusion that although separate shares were allotted to all the different members of the family, the intention was that Mahabir Pershad should have a separate share, and that the rest of the family, consisting of Ramjiban, Ram Narain, and Thakoor Pershad, should hold the remainder of the property jointly amongst themselves. The evidence upon the record shows that in the transaction that was then entered into, Ramjiban Sahu was, so far as Ram Narain Sahu and Thakoor Pershad Sahu were concerned, the moving spirit; and although the names of Bhago Sahun, the mother of Ram Narain, and Mauli Sahun, the mother of Thakoor Pershad, appear upon the document as having assented to and approved the ikrarnama, still it was left entirely to Ramjiban, and possibly to Moti Ram Sahu, the am-mokhtar of the two ladies, to enter into any arrangement that they pleased. On looking at the evidence of Moti Ram himself, who was called by the defendants, it appears that it was Ramjiban Sahu that had an am-mokhtarnama executed in his favour on behalf of the said two ladies; that ever since Lalji Sahu's death, Ramjiban was the head of the family; that there was no dispute of any sort among Ramjiban, Thakoor Pershad, and Ram Narain at the time when Mahabir's share was separated; that no partition took place amongst these three persons; that so long as Ramjiban and Thakoor Pershad were alive, they were joint and not separate from Ram Narain; that agreeably to the ikrarnama, the share of Mahabir only was partitioned; that it was Ramjiban who requested him (the witness) to sign the ikrarnama; that the seals of both the ladies used to be in the custody of Ramjiban; and that he (the witness) never saw the two ladies interfere in any way with the management of the property. The witness refers to a kobala bearing date 8th November 1883, under which Ramjiban, Ram Narain,

(1) (1866) 11 Moo. I. A. 75.

(2) (1873) L. R. 1 I. A. 55; 13 B. L. R. 235.

Thakoor Pershad, and Mahabir Pershad (Ram Narain and Thakoor Pershad being represented by their respective mothers) sold certain properties for the purpose of liquidating their debts. The terms of this document are no doubt in keeping with the ikarnama in question; but it will be observed that it was signed, as the ikarnama was by Moti Ram Sahu; and the witness says with reference thereto that he signed it at the request of Ramjiban, and that at that time the two ladies, Mauli and Bhago Sahun, were not present.

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"Upon referring again to the evidence of Uma Churn Mozoomdar, who was a pleader on behalf of the two ladies in the certificate case in the year 1883, which was brought to a termination by the ikarnama, and who presented the petition for the certificate, as also a petition bearing date the 25th June 1883, notifying the compromise under the ikarnama, it is very uncertain whether the ladies had any hand in the conduct of that litigation or in the termination thereof.

"In this state of facts, it seems to us to be extremely doubtful whether a transaction like this, entered into by the then managing member of the family, would be binding upon the minors, though, no doubt, ostensibly the names of their natural guardians were used as representing their interests. But, however that may be, on looking into the other portions of the evidence, it seems to be clear enough that what followed upon the ikarnama was that Mahabir Sahu was the only person who separated from the family, Ramjiban, Ram Narain, and Thakoor Pershad continuing to be joint both in mess and property; that Ramjiban continued to manage the family property in the same manner as he had been doing ever since Lalji Sahu's death; and that after his (Ramjiban's) death, which, as has already been mentioned, took place in June 1887, the plaintiff, Ram Narain, became the head of the family and held the whole property, excluding Mahabir Sahu's share, as if it was exclusively his. These facts appear quite clear upon the evidence of some of the witnesses called by the defendants themselves, and they are corroborated, at any rate, to some extent, by the statement on oath of Babu Hari Das, father of the defendants Nos. 2 and 3, on the 5th January 1887, in the certificate case between Ramjiban Sahu and Mussummat Amta Sahun, the widow of Thakoor Pershad Sahu, wherein he stated that the family, save and except Mahabir Sahu, was joint in business, and continued to be so even after the separation of Mahabir Sahu. And we may here also refer to a petition bearing date the 2nd December 1886 presented by Ramjiban Sahu, as showing that the family (save and except Mahabir) was really joint, and that a share of four annas of the family property was allotted to Mahabir Pershad Sahu, the remaining 12 annas share remaining joint. These two statements—one by Hari Das, the predecessor of some of the defendants 1st party, and the other by Ramjiban Sahu—were made some time before the suit by the defendants 1st party was instituted, and in which having obtained a decree against the widows of Ramjiban and Thakoor Pershad, they sought to attach the properties in suit for the realization of their claim. We may add that, supposing it was ever any part of the intention of Ramjiban or the mothers of Ram Narain and Thakoor Pershad, respectively, to effect a separation in estate between all the parties concerned, it was in effect abandoned immediately after the ikarnama was executed and Mahabir separated himself from the rest of the family.

"It may well be said, having regard to the facts of this case, that though the ikarnama of 1883 operated as a separation in estate between all the four members

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of the family, yet immediately or shortly afterwards Ramjiban Sahu, Ram Narain Sahu, and Thakoor Pershad Sahu reunited themselves as members of a joint family and continued to be so until Ramjiban Sahu's death.

"It will be remembered that the second issue that was laid down by the Subordinate Judge was 'whether the husbands of the judgment-debtor defendants (that is to say, the 2nd party) were separate from the plaintiff at the time of their respective deaths;' and, indeed, that was the principal issue which had to be tried in the case, and which has to be determined in the present appeal; for if, upon the dates on which Thakoor Pershad Sahu and Ramjiban Sahu respectively died, the family was a joint and undivided one, notwithstanding the ikrarnama of 1883, the plaintiff would be entitled to succeed upon the right of survivorship; and if it does appear upon the evidence, as disclosed by the conduct of the parties concerned, that subsequent to the ikrarnama the family was a joint and undivided one to all intents and purposes, the Court might well presume that there was a reunion of the family. The matter of this reunion need not have been distinctly put in issue between the parties: it was involved in the main issue that was tried in the case. It is not, however, necessary to express any decisive opinion upon this matter. It is sufficient to say, upon the second issue, as it was laid down by the Subordinate Judge, that, as a matter of fact, the family was, at the time of the deaths of Thakoor Pershad and Ramjiban Sahu, respectively, a joint and undivided family, and that the plaintiff is therefore entitled to come in by right of survivorship.

"The learned counsel for the appellant, in the course of his argument, referred to an attested copy of the general register of revenue-paying lands, prepared under Bengal Act VII of 1876 as showing that the ikrarnama of 1883 was given effect to by separate registration of names of all the four members of the family; but after some little examination of that register, the learned counsel frankly admitted that that position could not be maintained. We might add that, in the absence of the petitions upon which the said register was prepared, no inference whatever, one way or the other, can be drawn from the register itself. And we might refer to a case decided by this Court—*Hoolash Kooser v. Kasseo Proshad*(3)—in which this Court was unable to hold that such a register is any proof of a separation in estate.

"We may, however, state that the Subordinate Judge is not right when he says that 'the ikrarnama merely defined and fixed the shares of the members which each would get in case of actual partition and separation, for it recites that under this deed each individual has the power to live as a member of the joint family as before, or separate his own business.' This view, as expressed upon the terms of the ikrarnama itself, is not correct; for whether it was optional with the parties to continue to live together as members of a joint family, or separate themselves in business, their shares in the family estate having been defined, that is to say, separate shares having been allotted to each of them, it was in their power to effect a partition by metes and bounds, if they so pleased. The question is not whether there was a separation by metes and bounds, but a separation in estate and interest; for that would have the same legal effect, so far as altering the status of the family was concerned, as a partition by metes and bounds."

(1) (1881) I. L. R. 7 Calc. 369.

The High Court decree, therefore, dismissed the appeal with costs.

On this appeal,

J. D. Mayne for the appellants contended that the ikrarnama of 21st June 1883 operated to place all the members of the family in a state of separation from its date. The oral evidence that the rest of the family (except Mahabir Sahu) remained joint only went to show either that there had been no partition by metes or bounds or, in the alternative, that there had been reunion between the other members of the family. But partition by metes and bounds was not necessary to create a separation, and a reunion in this case would only have established a tenancy in common and not a joint tenancy with survivorship. Reference was made to the law as to reunion laid down in the *Mitakshara*, Ch. II, s. 9; *Stokes' Hindu Law Books*, p. 452; *Smriti Chandrika*, Ch. XII, p. 222; *Dayabhaga*, Ch. XII, p. 355, ss. 3 and 4; *Dayakrama Sangraha*, Ch. V, ss. 2 and 4, p. 507; *Mayukha*, Ch. IV, s. 9, para. 1; *Manu*, Ch. IX, paras. 210—212; and the case of *Ramasami v. Venkatesam* (1), it being contended that reunion was possible only between certain specified relations, namely, a father, brother, or paternal uncle. In the present case there could be, therefore, it was submitted, no legal reunion.

H. Cowell for the respondent, Ram Narain Sahu, contended that in the construction of the ikrarnama of 21st June 1883 the intention was that Thakoor Pershad, Ramjiban, and Ram Narain should remain joint in estate. Such intention, it was submitted, appeared not only on the face of the deed, but from the subsequent conduct of the parties. To that effect there were concurrent findings of fact by the two Courts, and there were also concurrent findings that they did in fact remain joint after the execution of the ikrarnama. This the deed gave them the option of doing, and that clause is inconsistent with the intention that there should be separation at once on the execution of the deed without more. The deed was not sufficient by itself to effect separation where the subsequent conduct of the members of the family showed their wish to remain united. *Babaji Parshram v.*

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(1) (1892) 1. L. R. 16 Mad. 440.

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Kashibai (1); *Ambika Dat v. Sukhmani Kuer* (2), and *Tej Protap Singh v. Champa Kalee Koer* (3) were referred to. In the present case the separation proposed in the *ikrarnama* was not carried out nor perfected. The registration of the specific shares of the members under the Land Registration Act (Bengal Act VII of 1876) was not sufficient to effect separation. It was merely registration, in accordance with the Act, for revenue purposes—*Hookash Koer v. Kasse Proshad* (4). It was doubtful too whether such a deed as the *ikrarnama* would be binding on the minor members of the family under the circumstances of the case. No separation, it was submitted, had been effected between Ramjiban, Thakoor Pershad, and Ram Narain, who continued to live joint in estate; and Ram Narain as the survivor was entitled to succeed to the whole of the joint property. The decision of the High Court was therefore right.

Mayne, in reply, cited *Joy Narain Giri v. Girish Chunder Myti* (5) and *Chidambaram Chettiar v. Gauri Nachiar* (6), pointing out that both of them were opposed to the case of *Babaji Parshram v. Kashibai* (1). That some of the parties to a deed of partition were minors made no difference. Those who were of full age could look after their interests and represent them in the transaction. On coming of age those who were minors could set it aside if fraudulent or opposed to their interests, but not merely on the ground that they were minors and were not properly represented by those of the family who were of age.

The judgment of their Lordships was delivered by

April 29.

LORD DAVY. At the beginning of the year 1883 four persons named Mahabir Pershad, Ramjiban, Ram Narain, and Jugdis Pershad, otherwise Thakoor Pershad, were members of a Hindu family joint in estate. Their pedigree is given on page 3 of the record. It there appears that they were all

(1) (1879) I. L. R. 4 Bom. 157, 162.

(4) (1881) I. L. R. 7 Calc. 369, 371.

(2) (1877) I. L. R. 1 All. 437, 438.

(5) (1878) I. L. R. 4 Calc. 434; L. R. 5 I. A. 228.

(3) (1885) I. L. R. 12 Calc. 96, 103.

(6) (1879) I. L. R. 2 Mad. 83; L. R. 6 I. A. 177.

great-grandchildren of a common ancestor, Niru Sahu. Mahabir was the grandson of Jhonti, the elder son of Niru. Ramjiban and Ram Narain were sons of Juggernath, otherwise Gyan Chand, who was a son of Lalji, the younger son of Niru, and Thakoor was the son of Sheo Sahai, otherwise Udho, another son of Lalji. Mahabir and Ramjiban had attained their majority, the other two were minors. Some dispute appears to have arisen between the cousins, with the result that on the 24th April 1883, Musammat Bhago, mother and guardian of Ram Narain, and Musammat Mauli, mother and guardian of Thakoor Pershad, presented a petition to the District Judge, by which they alleged that Ramjiban was ready to waste the share of the minors in certain joint assets, and prayed for a grant to themselves of a certificate under Act XXVII of 1860, to enable them to collect the debts due to the deceased Lalji mentioned in the schedule annexed to the petition. It will be observed that in this schedule the petitioners, for the purpose of ascertaining the amount due to the minors, deducted from each debt one-fourth part as the share of Ramjiban. Mahabir Pershad appears to have objected to the grant of the certificate to the petitioners on the ground that the family of the petitioners was joint with him, and to have claimed an 8-anna share in the property of the joint family. A compromise was thereupon come to, and embodied in an ikrarnama, dated the 21st June 1883, to which Mahabir Pershad, Ram Narain by his mother and guardian, Ramjiban, and Thakoor Pershad by his mother and guardian, were all parties. By this instrument it was declared that an arrangement in respect of all the properties and estates, moveable and immoveable, as per list annexed, and those not included therein, had been come to in the following manner, viz., out of 16 annas a share of 4 annas had been allotted to Mahabir Pershad, grandson and heir of Jhonti, and out of the remaining 12 annas a share of 3 annas had been allotted to Ramjiban, a share of 3 annas to Ram Narain, and a share of 6 annas to Thakoor Pershad, the heirs of Lalji. The ikrarnama then continued as follows:—

“ Now all the parties are at liberty to have their respective names registered in the Collectorate jointly or separately, and to hold possession of the properties according to their respective proportionate shares. Each party shall have in future no claim of any kind whatsoever on the ground of the shares being more or less, or in

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respect of the debts due to mahajans, or in respect of the debts due to themselves against the other party, and each party shall pay off his proportionate share of the debts due to the mahajan in any way he thinks proper. Whatever sums are due to us from other persons under bahi khatas, mortgage or simple bond, zurpeshgi and sudbharna (deeds), as per private list separately drawn up and signed by us, the declarants, shall also be realised by us collectively either privately or through the Court, and divided among us in proportion to our respective shares, or the sums due to us respectively shall be collected separately. Every one of us has, by virtue of this deed, the power either to continue to live together as a member of the joint family as before, or to separate his own business, none of us having any objection thereto."

Another petition was thereupon presented by Ram Narain and Thakoor Pershad by their respective mothers and guardians in which, after stating the effect of the ikrarnama, they asked for a certificate to be granted in respect of the properties left by Lalji to the extent of 9 annas. And a petition appears to have been presented by Mahabir also. On the 28th July 1883 the District Judge passed an order that Mahabir, Thakoor, Ramjiban, and Ram Narain should get a joint certificate to collect debts due to the estates of Laji and Gyan Pershad.

Mahabir Pershad appears to have taken his share and nothing more is heard of him. Ramjiban, Ram Narain, and Thakoor Pershad, and after the latter's death Ramjiban and Ram Narain appear to have continued to live together and to have collected their revenue and enjoyed their property in all external respects in the same manner as before the execution of the ikrarnama.

Thakoor Pershad died in the year 1886 without having attained his majority, and leaving a widow, Musammat Amta, who was also a minor. Ramjiban died in the year 1887, apparently childless, but leaving a widow, Musammat Janki (now deceased). Ram Narain attained his majority in 1890. He is the first and principal respondent in this appeal, and is subsequently referred to as the respondent.

The appellants are the present representatives of a firm of money-lenders at Benares. On the 23rd May 1887 the then representatives of the firm commenced an action against (i) Musammat Janki as widow and heir of Ramjiban, (ii) Ram Narain, then a minor, and (iii) Musammat Amta (described as a minor), widow and heir of Thakoor Pershad, under the guardianship of Musammat Mauli, her mother-in-law and next friend, to recover money alleged to be due upon a mortgage executed by

Lalji in May 1869. A decree was made against all the defendants, and Ram Narain alone appealed. On his appeal the decree was reversed as against him on the ground that the evidence was insufficient to establish the claim, and by the decree of the High Court, dated the 12th June 1891, the suit was dismissed as against him. But it remained standing as against the other defendants, and execution was taken out against the property formerly of Ramjiban and Thakoor Pershad.

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Thereupon the respondent Ram Narain Sahu commenced the present action against the appellants and the respondents Musammat Janki and Musammat Amta. In his plaint he alleged that the husbands of the two widows and himself had been a joint family, and no separation had taken place between them, and he was therefore solely entitled to the property by survivorship. He made no mention of the ikrarnama of 21st June 1883, and he relied on two documents, called a sulehnama, of 24th January 1889, and an ikrarnama, of 26th July 1890, as admissions by the two widows respectively of his title. The substantial relief prayed was a declaration that the properties mentioned in the schedule belonged to the respondent.

By their written statement the appellants denied the respondent's title, and pleaded the ikrarnama of 21st June 1883.

The issues framed for adjudication were, *first*, is plaintiff's allegation of title by survivorship and possession true? *Second*, whether the husbands of the judgment-debtor defendants were separate from plaintiff at the time of their respective deaths?

The action was tried by the Subordinate Judge of Mozaffarpur. The learned Judge held that the ikrarnama of 21st June 1883 merely defined and fixed the shares of the members which each would get in case of actual partition and separation, and that there was no separation between Ramjiban, the respondent, and Thakoor Pershad, and accordingly he made a decree, dated the 18th January 1896, in favour of the respondent.

This decree was confirmed on appeal by the High Court of Bengal. The learned Judges in that Court thus expressed themselves with reference to the ikrarnama of the 21st June 1883:—

“We may say that if it stood alone without any other evidence—evidence of the conduct of the parties concerned about

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the time of this transaction and subsequent thereto—we should have to declare, in accordance with the decision of the Privy Council in the case of *Appovier v. Rama Subba Aijan*(1), that there was a separation in estate between all the parties concerned, though at the time there was no partition by metes and bounds. But, as laid down by the Judicial Committee in the case of *Doorga Pershad v. Kundun Koowar*(2), the question in every case like this is one of intention, namely, whether the intention of the parties, to be inferred from the instruments which they had executed and the acts they had done, was to effect a division such as to alter the status of the family.”

Looking at that document as a whole and reading it by the light of the evidence of the conduct of the parties, the learned Judges came to the conclusion that, although separate shares were allotted to all the different members of the family, the intention was that Mahabir Pershad should have a separate share, and that the rest of the family, consisting of Ramjiban, Ram Narain, and Thakoor Pershad, should hold the remainder of the property jointly amongst themselves. They expressed a doubt whether a transaction like this, entered into by the then managing member of the family, would be binding on the minors, though no doubt ostensibly the names of their natural guardians were used as representing their interests. But, however that might be, it seemed to them to be clear enough from the evidence that what followed from the ikrarnama was that Mahabir was the only person who separated from the family, Ramjiban, Ram Narain, and Thakoor Pershad continuing to be joint both in mess and property. It might well be said, they added, having regard to the facts of this case, that though the ikrarnama of 1883 operated as a separation in estate between all the four members of the family, yet immediately or shortly afterwards Ramjiban, Ram Narain, and Thakoor Pershad reunited themselves as members of a joint family, and continued to be so until Ramjiban's death. At the conclusion of the judgment is the following passage :—

“ We may, however, state that the Subordinate Judge is not right when he says that ‘ the ikrarnama merely defined and fixed

(1) (1866) 11 Moo. I. A. 75.

(2) (1873) L. R. 1 I. A. 55;
13 B. L. R. 235.

the shares of the members which each would get in case of actual partition and separation, for it recites that under this deed each individual has the power to live as a member of the joint family as before, or separate his own business.' This view, as expressed upon the terms of the ikrarnama itself, is not correct; for whether it was optional with the parties to continue to live together as members of a joint family, or separate themselves in business, their shares in the family estate having been defined, that is to say, separate shares having been allotted to each of them, it was in their power to effect a partition by metes and bounds, if they so pleased. The question is not whether there was a separation by metes and bounds, but a separation in estate and interest; for that would have the same legal effect, so far as altering the status of the family was concerned, as a partition by metes and bounds."

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The present appeal is from the decree of the High Court, dated the 6th December 1897.

Their Lordships entirely agree in the last quoted passage from the judgment of the High Court, and they think it expresses accurately the effect of the decision in *Appovier v. Rama Subba Aiyar*(1). It disposes of the reasons stated by the Subordinate Judge for his judgment, and in the opinion of their Lordships it is equally fatal to the first conclusion arrived at in the High Court, viz., that there was not in fact any separation in estate and interest between all the co-parceners in 1883. There is no difficulty in the construction of the ikrarnama, in which it is stated in unambiguous terms that defined shares in the whole estate had been allotted to the several co-parceners. Learned counsel for the respondent relied on the passage which gave liberty to any of the parties either to live together as a member of the joint family as before or to separate his own business as being inconsistent with a separation in estate. But there is no inconsistency, and the clause conferred on the parties no larger liberty of choice than they would have had without it. They might elect either to have a partition of their shares by metes and bounds, or to continue to live together and enjoy their property in common as before. Whether they did one or the other would affect the

(1) (1896) 11 Moo. I. A. 75.

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mode of enjoyment, but not the tenure of the property or their interest in it. Consistently with the broad principle laid down in the *Appovier case* (1), this was determined by the allotment to them of defined shares which, to use Lord Westbury's illustration, converted them from joint holders into tenants in common.

If the learned Judges meant that the legal construction or legal effect of an unambiguous document like the *ikrarnama* could be controlled or altered by evidence of the subsequent conduct of the parties, their Lordships cannot agree with them, and they do not think that the case of *Doorga Pershad v. Kundun Koowar* (2), cited by the learned Judges, is any authority for such a proposition. But, as will be seen from what has already been said, their Lordships do not regard the subsequent actings of the parties as inconsistent with the intention to subject the whole property to a division of interest, although it was not immediately to be perfected by an actual partition.

The question upon which their Lordships have felt most difficulty is whether the document can be considered as binding upon the co-parceners, who were minors at the date of it. But they think that in these proceedings they must treat it as binding upon them. There is no doubt that a valid agreement for partition may be made during the minority of one or more of the co-parceners. That seems to follow from the admitted right of one co-parcener to claim a partition; and (as has been said) if an agreement for partition could not be made binding on minors, a partition could hardly ever take place. No doubt if the partition was unfair or prejudicial to the minor's interests, he might, on attaining his majority, by proper proceedings, set it aside so far as regards himself. Some evidence was given to show that the mothers of the two minors were acting under the control and influence of Ramjiban. But as against this it may be pointed out that in the proceedings for a certificate which led to the execution of the *ikrarnama* they seem to have been acting independently of, and even adversely to, Ramjiban. For he can hardly be thought to have prompted a petition which contained an allegation that he was ready to waste the property of the minors. It should also be

(1) (1866) 11 Moo. I. A. 75.

(2) (1873) L. R. 1 I. A. 55; 13 B. L. R. 235.

said that the partition on the face of it was not unfair, and in fact the shares allotted to the minors were at least as large as, and perhaps larger than, they were strictly entitled to. Again, it was a partition in interest only, and the partition by metes and bounds was postponed to a period when they might be in a position to protect their own interests. Lastly, no suit has been brought or can now be brought by any of the parties to impeach the ikrarnama. Indeed, counsel for the respondent did not question the binding effect of the instrument, but relied on it as being, according to its proper construction, in his favour.

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It only remains to consider the second ground for the judgment of the High Court, viz., that the co-parceners reunited immediately or shortly after the date of the ikrarnama. Mr. Mayne met this point by saying that the parties were incompetent in law to reunite in the accurate sense of that word, or so as to restore the status of a family joint in estate. His argument was that in Bengal a member of a joint family once separated can reunite only with a father, brother, or paternal uncle, following the text of Vrihaspati quoted in Mitakshara, ii, 9, sect. 3. And he supported his argument by reference to other authorities.

Their Lordships do not find it necessary to express an opinion on this point, because, in the case before them, there is no proof of an intention of the parties to reunite in estate and interest. Indeed, there is not wanting evidence independently of the ikrarnama, and both before and after its execution, of an intention to separate their interests. Their Lordships again refer to the petition in the names of the minors, which preceded the execution of the ikrarnama. Separate shares in the family property were thereby claimed, and the grant of a separate certificate under Act XXVII of 1860 as regards the shares of the minors only was prayed, and by a petition presented by the advisers of the minors in their names after the date of the ikrarnama they prayed for a separate certificate of their 9-anna shares only. By a kobala dated the 8th November 1883, and therefore subsequent to the ikrarnama in favour of Hari Das and others, the parties again treat themselves as having separate shares. The entries in the registers, so far as they go, point in the same direction, but their

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Lordships agree with the Courts below in not attaching much weight to these as evidence.

The sulehnama dated the 24th January 1889 and the ikrar-nama of the 26th July 1890, which are mentioned in the plaint, were not relied on by counsel for the respondent, and properly so, because the signature of neither of those documents appears to be properly or sufficiently proved.

Their Lordships are therefore of opinion that the appeal to the High Court should have been allowed, and they will humbly advise His Majesty that the decree of the Subordinate Judge dated the 18th January 1896 and that of the High Court dated the 6th December 1897 be discharged, and instead thereof an order be made dismissing the suit of Ram Narain, the first respondent, with costs, and that the first respondent pay the costs of the appeal to the High Court. He will also personally pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants : *T. L. Wilson & Co.*

Solicitors for the respondent, Ram Narain Sahu : *Gordon, Dalbiac & Pugh.*

J. V. W.

APPELLATE CIVIL.

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Mortgage—Transfer of Property Act (IV of 1882) s. 85—Non-joinder—Apportionment of mortgage debt—Purchaser of mortgaged property—Release.

When a purchaser from the mortgagor of one of the mortgaged properties (subsequently released by the mortgagee from his lien), is not made a party to a mortgage suit brought by the mortgagee, the proper course is not to dismiss the suit for non-joinder, but to apportion the mortgage debt between the property so purchased and released, and the other mortgaged property. In such a case the mortgage should be treated as split up into two.

SECOND APPEAL by the plaintiff, Hari Kissen Bhagat.

The plaintiff sued on a mortgage bond, dated the 10th August 1884, executed by the defendants 1st party in his favour for a consideration of Rs. 800, the properties mortgaged being 3 annas 16 gundas share of mouzah Dighout Tetria, 3 annas 16 gundas share of mouzah Murkawa and 1 anna share of mouzah Rewai. It was alleged that the aforesaid share of mouzah Dighout Tetria had been subsequently sold by the defendants 1st party to Nawab Lutf Ali Khan of Patna, and as certain prior mortgages had been satisfied out of the sale-proceeds, the plaintiff made no claim in the suit against the said property. The defendants 2nd party were other mortgagees and purchasers. The whole of the mortgage debt, amounting to Rs. 4,300, was claimed in the suit, and it was prayed that should the sale-proceeds of the two other mortgaged properties be found insufficient to meet the claim, the person and other properties of the defendants 1st party might be proceeded against.

The defendant No. 6 alone contested the suit. He was one of the defendants 2nd party and a prior mortgagee of the 1 anna

* Appeal from Appellate Decree No. 2656 of 1899, against the decree of W. H. Vincent, District Judge of Bhagalpore, dated Sept. 28, 1899, reversing the decree of Karunamai Banerjee, Subordinate Judge of Monghyr, dated Dec. 9, 1898.

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share of mouzah Rewai, who had purchased the said property in execution of his mortgage decree. He pleaded amongst other things that the suit must fail, as the heirs of the said Nawab Lutf Ali Khan had not been made parties; that as the plaintiff, by an *ikrarnama* executed in favour of the said Nawab, had deliberately relinquished his mortgage lien over the property, mouzah Dighout Tetria, which was not sold for its full value, he (the plaintiff) had no right to give up that property and to proceed only against the other two properties for the satisfaction of his whole claim, and that on the principle enunciated in s. 82 of the Transfer of Property Act, the property, mouzah Rewai, was liable only for a proportionate portion of the plaintiff's claim.

The Subordinate Judge apportioned the whole of the mortgage debt between the two properties, Murkawa and Rewai, and passed a decree accordingly.

Both the plaintiff and the defendant No. 6 appealed to the District Judge. The learned Judge held that, in view of the provisions of s. 85 of the Transfer of Property Act, the suit could not proceed, as the heirs of the said Nawab of Patna were not made parties, though the plaintiff had notice of their interests; and he accordingly dismissed the suit.

Dr. Rash Behary Ghose and Babu Digambar Chatterjee for the appellants.

Babu Rajendra Nath Bose for the respondents.

BAKERJEE AND PARGITER JJ. In this appeal, which arises out of a suit brought by the plaintiff-appellant to enforce a mortgage-bond, the only question raised for determination is whether the Court of Appeal below was right in dismissing the suit of the plaintiff by reason of the purchaser of one of the mortgaged properties from the mortgagor not having been made a party to the suit.

The learned *vakil* for the plaintiff-appellant contends that the suit should not have been dismissed altogether, but the mortgage debt should have been apportioned between the property purchased by the person who has not been joined as a defendant and the other mortgaged property. He urges that, having regard to the fact that the property purchased by the person who has not been

joined as a party has been released by the plaintiff-mortgagee, the mortgage must be treated as having been split up, and that property cannot strictly speaking be considered any longer as property comprised in the mortgage sought to be enforced so as to make him a necessary party within the strict meaning of section 85 of the Transfer of Property Act. The contention is that, all that the state of facts in this case requires is that the mortgage should be treated as having been split up, and the release of one of the mortgaged properties by the mortgagee should be held to have the same effect as if the mortgagee had himself bought it; and if that is done and the mortgage debt apportioned between that property and the other mortgaged property, that is all that the defendant-respondent is entitled to have. And in point of fact that is all that the learned vakil for the respondent, a subsequent purchaser from the mortgagor, really insists upon.

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That being so, we think the proper course to take in this case is to set aside the decree of the Court below, and to send back the case to that Court in order that it may dispose of it after apportioning the mortgage debt in the manner stated above.

We think the parties in this appeal should bear their own costs.

Appeal allowed.

M. N. R.

PROSANNA KUMAR GUHA

v.

BANI KANTA BHATTACHARJEE.*

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May 20.

*Notice of appeal—Indian Companies Act (VI of 1882) ss. 169 and 214—
Appeal out of time.*

No appeal against an order made in the matter of the winding up of a Company under the Indian Companies Act of 1882, shall be heard by an Appellate Court unless notice of the same is given within three weeks after any order complained of has been made.

In re Estates Investment Company (1) not followed.

APPEAL by Prosanna Kumar Guha, (a shareholder) opposite party.

This appeal arose out of an application under s. 214 of the Indian Companies Act. It appears that on the 27th June 1899, an application was presented to the District Judge of Barisal for winding up the “Barisal Timber and Miscellaneous Trading Company.”

On the 5th August it was ordered that the Company be wound up, and Babu Bani Kanta Bhattacharjee be appointed Official Liquidator. On the 1st February 1901, the Official Liquidator reported that the accounts of the Company showed that certain sums had been expended on the purchase of *sundri* logs and their despatch to the Government Dockyard at Kidderpore, but that the proceeds of the sale had not been credited to the Company. Subsequently the said Official Liquidator again reported that Prosanna Kumar Guha, a shareholder of the Company, who had been the *de facto* manager at the time of the aforesaid transaction, in collusion with a clerk of the Company, misappropriated the money received from the Kidderpore Docks. Upon this report notices were served upon Prosanna Kumar Guha

* Appeal from Original Decree No. 439 of 1900, against the decree of C. W. Pittar, District Judge of Backergunge, dated July 9, 1900.

(1) (1869) L. R. 8 Eq. C. 227.

and Mohim Chander Sarkar to shew cause why they should not repay the amount to the Company and necessary orders be passed against them under s. 214 of the Indian Companies Act. Mohim Sarkar in his written statement alleged that he knew nothing about the receipt of the money. Prosanna Kumar Guha denied having misappropriated the money and having obtained the money by cheque from the Bank of Bengal.

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The District Judge found that Prosanna Kumar Guha in his capacity as an officer of the Company misappropriated the money and decreed the suit against him on the 9th July 1900. Against this decree an appeal was filed in the High Court on the 28th August 1900. No notice of this appeal, as required by s. 169 of the Act, was given within three weeks of the order complained of.

*Babu Surendra Chandra Sen*, for the respondent, took a preliminary objection that, inasmuch as no notice of this appeal was given to his client within three weeks of the order complained of, the appeal could not be heard, regard being had to s. 169 of the Indian Companies Act.

*Dr. Ashutosh Mookerjee (Babu Chandra Kanta Ghose with him)* for the appellant. I submit, s. 169 of the Indian Companies Act does not apply to this case. That section applies when the matter of winding up properly takes place under the Act. In this case application was not made by the Company, but by a person who professes to be a shareholder whose name was removed later on. The case of *In re Estates Investment Company*(1) supports my contention.

**MACLEAN C. J.** The application in this case was made under section 214 of the Indian Companies Act of 1882, and, stated briefly, the object of the application was to make the applicant liable for the alleged misfeasance, or breach of trust, or one of the cases under that section.

The matter came before the District Judge of Backergunge. He made a decree against the applicant for a sum of 600 rupees odd; the date of that decree was the 9th of July 1900, and the memorandum of appeal in this Court was not filed until the 28th

(1) (1869) L. R. 8 Eq. C. 227.

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of August 1900. It is urged for the respondent that, having regard to section 169 of the same Act, the appeal is out of time by reason of the fact that the notice required by the section was not given within three weeks after the order complained of was made. There is no valid answer to that contention: the language of section 169 is absolutely clear upon the point.

We have been referred to the case of *In re Estates Investment Company* (1). But that decision is not binding upon us, and, speaking with all respect, I am not disposed to follow it.

The appeal, which is out of time, must be dismissed with costs.

GREIDT J. I concur.

*Appeal dismissed.*

S. C. G.

(1) (1869) L. R. 8 Eq. C. 227.

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## APPELLATE CIVIL

TROYLOKYA NATH BOSE

v.

JYOTI PROKASH NANDI.\*

1908

April 2, 8, 6.

*Limitation—Mortgage—Execution of decree, application for—Limitation Act (XV of 1877) s. 4, Sch. II, Art. 179, Esp. I—Stop in aid of execution—Mortgage decree—Subsequent mortgages—Pleading limitation in appeal—Application to postpone sale—Opposition to application of judgment-debtor.*

In an application for execution of a mortgage decree by a prior mortgagee, a subsequent mortgagee as a judgment-debtor is competent to plead limitation either in the first Court or in appeal.

Article 179, Schedule II, of the Limitation Act applies to an application for execution of a mortgage decree.

The time from which limitation runs under cl. 4 of Art. 179 of the Limitation Act is the date of applying, and not the date on which the application is disposed of.

*Fakir Muhammad v. Ghulam Hussain*(1), *Sarat Kumary Dassi v. Jagat Chandra Roy*(2) followed.

An application by the decree-holder to postpone a sale not with a view to enable him to bring the property to sale more advantageously for him, but upon other grounds, is not an application to take some step in aid of execution.

*Abdul Hossain v. Fazlun*(3) followed.

The decree-holder's opposition to an application of the judgment-debtor to sell the properties in an order different from that in which they have already been directed to be sold is not an application to take some step in aid of execution.

*Dharanamma v. Subba*(4) distinguished.

**APPEAL** by judgment-debtors (objectors), Troylokya Nath Bose and others.

A mortgage decree was passed in the Court of the Subordinate Judge of Monghyr on the 17th July 1893, in suit No. 87 of 1892, against 15 defendants. The defendant No. 1, Narsing Perakash Misser, was the mortgagor; the appellant, Bhupendra Nath Bose, the defendant No. 2, was a subsequent mortgagee; the

\* Appeal from Original Order No. 160 of 1900, against the order of Tara Pramanee Banerjee, Subordinate Judge of Monghyr, dated Feb. 24, 1900.

(1) (1878) I. L. R. 1 All. 590.

(3) (1892) I. L. R. 20 Calc. 255.

(2) (1897) 1 C. W. N. 260.

(4) (1833) I. L. R. 7 Mad. 306.

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defendant No. 13, M. J. Wilson, was a prior mortgagee of some of the mortgaged properties, now represented by the appellants, Troylokya Nath Bose and Upendra Nath Bose, and some of the remaining defendants were subsequent mortgagees, some were subsequent purchasers of some of the mortgaged properties, and the rest, namely, defendants Nos. 12, 14 and 15, were prior mortgagees.

The decree was in these terms:—

"That the plaintiffs do recover from the defendants Rs. 21,615-9-8, the amount claimed by them, Rs. 1,568-7-6, interest *pendente lite*, and Rs. 1,409-14, costs in Court,—in all Rs. 24,593-15-3, besides future interest at the rate of 6 per cent. per annum from the date of this decree to that of realisation. If the defendants do not pay the decretal amount within three months from the date of this decree, the mortgaged properties, save and except the property No. 2, which has been exempted from the plaintiff's claim, shall be sold subject to the lien of the debt of the defendants Nos. 5, 13 and 14, the property No. 8 being sold last. The defendant No. 7 do recover from the plaintiffs Rs. 78-14-3 on account of costs of this suit, and the person and other properties of defendant No. 1 shall be liable for the payment of the decretal money."

The first application for execution of the decree was filed on the 25th January 1895, in which the decree was sought to be executed against the defendant No. 1, and the main prayer was that an order absolute for sale might be passed and that the mortgaged properties might be sold by auction in the order given in the decree. On this application the order absolute for sale was made on the 2nd March 1895; sale proclamations were issued and the sale was fixed to take place on the 10th June 1895. On the 1st June 1895 the decree-holders filed a petition for permission to bid at the sale, and on the 10th June that petition was disposed of and the decree-holders were allowed to bid. On the same day, *i. e.*, the 10th June, on the petition of the decree-holders, the sale was put off to the 15th idem, and the decree-holders' pleader having objected to the properties being sold in the order prayed for by a subsequent mortgagee, the objection was allowed and the latter's petition was rejected. On the 15th June 1895 there was no sale and the execution case was dismissed for default.

The next application for execution was filed on the 8th June 1898, in which the decree-holders sought execution against the defendant No. 1 by sale of the mortgaged properties. This application appears to have been struck off on the 11th August 1898.

The present application for execution was filed on the 15th July 1899, in which execution was sought against all the judgment-debtors by issue of notices on them. In this execution case, the judgment-debtor, appellant Bhupendra Nath Bose, put in a petition objecting that the application for execution of the decree was barred by limitation; that in execution of a decree in respect of the prior mortgage of the defendant No. 13 to which the present decree-holders were party, some of the mortgaged properties had been purchased by the petitioner and his brothers, TROYLOKYA Nath Bose and Upendra Nath Bose, on the 21st June 1895, and that these properties could not be sold again, and that there were some irregularities in the publication of the sale proclamation and in the service of notices. The other appellants, TROYLOKYA Nath Bose and Upendra Nath Bose, also put in a similar petition of objection.

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The Subordinate Judge dealt with these objections under section 244 of the Civil Procedure Code on the 24th February 1900. He held (i) that the properties mortgaged to the defendant No. 13 and purchased by the objectors could not be sold again, (ii) that the application for execution was not barred by limitation, and (iii) that owing to irregularities, the sale could not take place on the date fixed, i.e., the 26th February 1900. With reference to the question of limitation, the following reasons were assigned by the Subordinate Judge for his decision: (1) that an application for execution of a mortgage decree is not necessary, such a decree being enforceable by an application under s. 89 of the Transfer of Property Act, as laid down by the High Court in Circular Order No. 13 of the 27th April 1892, so that Article 179 of the 2nd Schedule of the Limitation Act did not apply to the sale of a mortgaged property directed by a mortgage decree; (2) and that assuming that Article 179 applied to an application to enforce a decree for the sale of mortgaged properties, the application for execution made on the 8th June 1898 was not barred by limitation on account of the following things done by the decree-holders on the 10th June 1895, which must be regarded as steps taken in aid of execution: (i) applying for postponement of the sale, and (ii) pressing the application for permission to bid, which application was granted.

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From this decision the objectors appealed to the High Court. The appeal originally came on for hearing, on the 17th July 1901, before a Division Bench (Ameer Ali and Pratt JJ.), and it was contended for the respondents that as the Subordinate Judge had given effect to the objection of the appellants in regard to the properties which they had purchased in execution of Mr. Wilson's decree and which had consequently been exempted from liability under the present decree, the appellants had no *locus standi* and were not entitled to object to the execution of the decree on the ground of limitation. On the other hand, it was contended for the appellants that as Bhupendra Nath Bose was not only an auction-purchaser as aforesaid, but was also a party to the original decree as a puisne encumbrancer, he was entitled to plead limitation. In these circumstances, the case was sent back to the Lower Court for a finding as to whether Bhupendra Nath Bose was a puisne encumbrancer, nothing definite appearing on the record. The Subordinate Judge found on the evidence that Bhupendra Nath Bose was a puisne mortgagee, and after this finding was received, the appeal came up for hearing again.

April 2, 3.

*Mr. O'Kinealy* (Dr. *Ashutosh Mukerjee* and *Babu Shoroshi Charan Mitter* with him) for the appellants. An application to postpone a sale is not one to take some step in aid of execution: see *Abdul Hossein v. Fazilun*(1). Nor is appearance to oppose an application made by the judgment-debtors one to take such step. The application contemplated by Article 179 is one to obtain some order of the Court in furtherance of the execution of the decree: *Unesh Chunder Dutta v. Soonder Narain Deo*(2). Application for permission to bid is not an application to take step in aid of execution. There was no application to bid made on the 10th June 1895. Leave to bid was applied for on the 1st June. See *Raghunundun Misser v. Kallydutt Misser*(3), *Fakir Muhammad v. Ghulam Husain*(4), *Tarak Chunder Sen v. Gyanada Sundari*(5). The cases of *Vinayakrao Gopal Deshmukh v. Vinayak Krishna Dhebri*(6) and *Dalel Singh v. Umrao Singh*(7) apparently take

(1) (1892) I.L.R. 20 Calc. 255.

(4) (1878) I.L.R. 1 All. 580.

(2) (1899) I.L.R. 16 Calc. 747.

(5) (1896) I.L.R. 23 Calc. 817.

(3) (1896) I.L.R. 23 Calc. 690.

(6) (1895) I.L.R. 21 Bom. 381.

(7) (1900) I.L.R. 22 All. 399.

a contrary view, but in each case one shall have to go into facts to decide whether an application is a *bond fide* one. One has to take an application and see what it comes to under the Civil Procedure Code. To *press* an application to bid is no application under Article 179. See *Sarat Kumary Dassi v. Jagat Chandra Roy*(1).

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The first application for execution was only against one of the judgment-debtors, and in the decree the person and other properties of that judgment-debtor were declared liable. The decree is essentially *separate* and *several*, so that the present appellants come under the first part of the second paragraph of Explanation I of Article 179.

*Dr. Rash Behary Ghose (Babu Nalini Ranjan Chatterjee with him)* for the respondents. It is submitted that a puisne mortgagee cannot contend that a decree for sale upon a prior mortgage cannot be enforced for the Statute of Limitations, at any rate in appeal. The decree is not merely in favour of the prior mortgagee—it is in favour of all: *Kissory Mohun Roy v. Kali Churn Ghose*(2).

An application for postponement of a sale which secures a better advantage to the decree-holder saves limitation: see *Amar Singh v. Tika*(3). [Banerjee J. There an adjournment by Court had already taken place without fixing a date.] See also *Rajlukhy Dasses v. Rash Munjary Chowdhraïn*(4). Reference was also made to *Sariatoolia Molla v. Raj Kumar Roy*(5), *Abdul Hossein v. Fazlun*(6), *Umesh Chunder Dutta v. Soonder Narain Deo*(7) and *Fakir Muhammad v. Ghulam Husain*(8). The case of *Sarat Kumary Dassi v. Jagat Chandra Roy*(1) has no particular bearing on the present case.

Next, the opposition to the application of the puisne mortgagee to sell properties in a certain order was an application to take step in aid of execution. An oral application is enough: *Trimbak Bapuji Patwardhan v. Kashinath Vidyadhar Gosavi*(9); see also *Dharanamma v. Subba*(10). A liberal construction should

(1) (1897) 1 C.W.N. 260.

(2) (1897) I.L.R. 24 Calc. 190.

(3) (1880) I.L.R. 3 All. 139.

(4) (1879) 5 C.L.R. 515.

(5) (1900) I.L.R. 27 Calc. 709.

(6) (1892) I.L.R. 20 Calc. 255.

(7) (1899) I.L.R. 16 Calc. 747.

(8) (1878) I.L.R. 1 All. 580.

(9) (1897) I. L. R. 22 Bom. 722.

(10) (1882) I. L. R. 7 Mad. 306.

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be put as against limitation. See also *Gobind Pershad v. Rung Lal*(1).

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As to the application for leave to bid, a contrary view is taken in *Toree Mahomed v. Mahomed Mabood Bux*(2).

*Mr. O'Kinealy* in reply. The only construction to be put on art. 179, cl. 4, is the proper grammatical construction, neither strict nor liberal. The point is, not what the cases mean, but what the article means. In the case of *Dharanamme v. Subba* (3), there was an order for sale and the judgment-debtor objected to the order. In the present case the Judge decided on the opposition of the judgment-debtor and not on the application of the decree-holders. The petition for postponement of sale, which is not on the record, was only a temporary retardation of the proceedings in execution.

*Cur. adv. vult.*

April 6.

**BAHARJEE J.** This appeal arises out of an application for execution of a mortgage decree. The application was opposed by some of the judgment-debtors, one of whom at least was a subsequent mortgagee; and the objection was that execution of the decree was barred by limitation.

The Court below has disallowed that objection, holding in the first place that there is no limitation for applications for the sale of mortgaged property under section 89 of the Transfer of Property Act, and, in the second place, that even if article 179 of the Second Schedule of the Limitation Act applies to the case, the application for execution was saved from being barred by limitation by reason of the decree-holders having applied for putting off the sale on the 10th June 1895 and by reason of his having pressed his application for permission to bid on that same date, which was within three years from the date of the last application.

The objecting judgment-debtors being dissatisfied with this decision have preferred this appeal, and it is contended on their behalf that the Court below is wrong in holding that there was no limitation applicable to the case; and that even if limitation

(1) (1898) I. L. R. 21 Calc. 23.

(2) (1883) I. L. R. 2 Calc. 730.

(3) (1883 I. L. R. 7 Mad. 306.



applied, execution of the decree was saved from being barred by limitation by reason of what the decree-holders did on the 10th June 1895. It is further contended for the appellants that the Court below ought to have held that execution was barred by reason of the previous application for execution having been against judgment-debtors other than the objectors, as the case came within the scope of the first part of the second paragraph of Explanation I to Article 179 of the Limitation Act.

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On the other hand, it is argued for the respondents that the judgment of the Court below was not only right so far as it went, but that the Court below should further have held that it was not competent to the objectors, who were puisne mortgagees, to contend that the execution of the decree was barred by limitation; and that even if it was open to them to raise the contention, the present application was saved from being barred by reason of the decree-holders resisting the application of some of the judgment-debtors for the sale of the mortgaged properties in a certain order.

The contentions raised in this appeal, therefore, give rise to the following points for determination:—

(i) Whether the appellants, the subsequent mortgagees, can plead limitation;

(ii) Whether there is any limitation for the execution of a mortgage decree;

(iii) Whether execution is barred by reason of the prior applications for execution being made against the judgment-debtors other than the appellants;

(iv) Whether there was any application for leave to bid within a period of three years before the date of the present application; and if so, whether such application can give the plaintiffs a fresh start;

(v) Whether the application of the 10th June 1895 for postponement of sale was an application to the Court to take some step in aid of execution; and

(vi) Whether the decree-holders' opposition to the application of some of the judgment-debtors to sell the mortgaged property in a certain order, gave them a fresh start for reckoning the period of limitation.

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On the first point, the broad contention was that, as the subsequent mortgagee is benefited by the execution proceedings, when the property is sold at the instance of the prior mortgagee, he being entitled to the surplus sale-proceeds, his interest is similar to that of the decree-holders, and it is not competent to him, therefore, to take the objection that execution is barred by limitation. But when it was pointed out that if the application was barred by limitation, the Court was bound, under s. 4 of the Limitation Act, to disallow it, even though limitation was not set up, the learned vakil for the respondents changed his ground a little, and urged that although that might have been true, when the case was before the first Court, it was not open to the appellants in appeal to raise the plea of limitation and ask the Appellate Court to set aside the judgment of the first Court, if it was not competent to the appellants to raise the plea of limitation. Now let us see whether this contention is sound. No authority is cited in support of it, and there is not much reason that we can find in its favour. It is true, the subsequent mortgagee is entitled to the surplus sale-proceeds after the mortgaged property is sold at the instance of the prior mortgagee; but if the claim of the prior mortgagee to sell the property could be shown to be barred by limitation, the position of the subsequent mortgagee would not be rendered worse, but would be rendered better; for he would then occupy the position of a first mortgagee. And it cannot, therefore, be said that it was not competent to him to raise an objection which might improve his position. We must therefore decide the first point in favour of the appellants.

As to the second point, we think the Court below is clearly in error; and the learned vakil for the respondents does not seriously endeavour to support the judgment appealed against upon the second point. There is no reason for holding that Article 179 of the Second Schedule of the Limitation Act does not apply to the application for execution of a mortgage decree. The second point must also be decided in favour of the appellants.

On the third point, the appellants' contention is this, that as the judgment-debtors, who are subsequent mortgagees, are liable only to the extent of the properties covered by their

mortgage, the decree must be treated as a decree passed several-  
ly against them and the original mortgagor within the meaning  
of the first part of the second paragraph of Explanation I to  
Article 179 of the Limitation Act; and if that is so, as the  
previous application was clearly one only against certain judg-  
ment-debtors other than the appellants, the present application  
must be barred. We are unable to accept this contention as  
sound. It is true that the only property that could be brought to  
sale as against the subsequent mortgagees would be the property  
mortgaged to them, but the decree does not in any way apportion  
the mortgage debt; and it cannot therefore be said, having regard  
to the terms of the decree, that it comes within the scope of the  
first part of the second paragraph of Explanation I. The third  
point must therefore be decided against the appellants.

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Upon the fourth point, if there had been any application by  
the decree-holders for leave to bid within three years before the  
date of the present application, then it would have been necessary  
to consider whether the cases *Raghunundun Misser v. Kally-*  
*dut Misser*(1) and *Toree Mahomed v. Mahomed Mabood Buz*(2)  
have been correctly decided, so far as the question whether an  
application by the decree-holders for leave to bid is an application  
to the Court to take some step in aid of execution, was answered  
in the negative, and for that purpose to refer the question to a  
Full Bench. The earlier of these two cases has, I may add, been  
dissented from by the Allahabad High Court in the case of  
*Bansi v. Sikree Mal*(3) and by the Bombay High Court in the  
case of *Vinayakrao Gopal Deshmukh v. Vinayak Krishna Dhebri*(4),  
and speaking for myself, I feel bound to say I have consider-  
able hesitation in following the rule laid down by this Court in  
the two cases cited above, because an application to the Court by  
the decree-holder to give him leave to bid is to my mind an  
application to the Court to take some step, that is, to do something  
which would aid execution, that is, make it effective by securing  
a higher price for the property to be sold. But it becomes un-  
necessary to pursue this discussion any further, as there was no  
application by the decree-holders for leave to bid on the 10th June

(1) (1896) I. L. R. 23 Calc. 690.

(3) (1890) I. L. R. 13 All. 211.

(2) (1883) I. L. R. 9 Calc. 730.

(4) (1895) I. L. R. 21 Bom. 331.

1895, or on any date within three years before the date of the present application. Though the application of the 1st June was not disposed of until the 10th, it could not be said that that circumstance made the 10th the starting point, the time from which limitation runs under clause 4 of Article 179 being, in the words of the clause, "the date of applying," and not the date on which the application is disposed of. The view we take is in accordance with that taken by this Court in the case of *Sarat Kumary Dassi v. Jagat Chandra Roy*(1) and the Full Bench decision of the Allahabad High Court in the case of *Fakir Muhammad v. Ghulam Husain*(2). The fourth point must, therefore, be decided in favour of the appellants.

Upon the fifth point, the appellants' contention is that the application for postponement of sale, such as the one made by the decree-holders in this case on the 10th of June 1895, was not an application to the Court to take some step in aid of execution, but was rather an application to the Court to take some backward step in retardation of execution. Without going so far as to say that there can be no application for postponement of sale which can come within the description of an application to the Court to take some step in aid of execution, we feel bound to say that the application here referred to was clearly not one of that description. The application asked the Court to postpone the sale—why? Because the decree-holders by reason of a change of their manager were not acquainted with all the facts, and because several of the properties had been advertised for sale at the instance of the prior mortgagee, and by way of supplement, moreover, because no intending purchasers were present. And the application wound up by praying that the sale might be kept pending for seven days and by stating that during the interval all the particulars would be ascertained and then the properties would be caused to be sold. There is no indication here that the decree-holders wanted this postponement with a view to enable them to bring the properties to sale more advantageously for them, as was suggested in the argument. The view we take is in accordance with that taken by this Court in the case of *Abdul Hossein v. Fazilun*(3).

(1) (1897) 1 C. W. N. 260.

(2) (1878) I. L. R. 1 All. 580.

(3) (1892) I. L. R. 20 Cal. 255.

The fifth point must therefore be decided in favour of the appellants.

On the sixth point, the learned vakil for the respondents contended that the decree-holders' opposition to the judgment-debtor's application to sell the property in a certain order should be held to be an application to the Court to take some step in aid of execution, within the meaning of clause 4 of Article 179; and in support of this contention the case of *Dharanamma v. Subba*(1) has been relied upon, and certain other cases not quite in point have also been cited as supporting the same view. We are of opinion that the argument is not correct, and that the cases cited are distinguishable from the present. The words of the law are in our opinion quite clear. To give the decree-holders a fresh start there must be an application to the Court to take some step in aid of execution. Did the decree-holders, by simply resisting the judgment-debtor's application to sell the properties in an order different from that in which they had already been directed to be sold, ask the Court to take some step in aid of execution? What they did was to ask the Court to refrain from withdrawing the step in aid of execution which it had already taken. That cannot be taken to mean an application to the Court asking the Court to take some step which has not already been taken. The step which the decree-holders by their resistance wanted the Court to persevere in taking, had already been taken, and the Court was merely asked not to accede to the judgment-debtor's application, which would have had the effect of making the Court refrain from doing what it had already directed should be done. In the Madras case(1) cited, the decree-holder's resistance was not of the simple negative character, but was coupled with a prayer to sell the property in an order different as well from that in which the judgment-debtors asked that they should be sold as from the order in which the Court had previously directed their sale. That, therefore, might be treated as an application asking the Court to take some positive step, whether it was really and truly in aid of execution or not, we need not pause to consider.

As for the other cases cited, there an order adverse to the decree-holder had already been made, and then the decree-holder

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(1) (1893) I. L. R. 7 Mad. 306.

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asked the Court to take some step towards further execution, which they thought was the best they could ask the Court to do. That being so, this point also must be decided in favour of the appellants.

The result is that the order of the Court below must be set aside and this appeal allowed with costs.

**GRIFFITH J.** I concur in allowing this appeal, and agree generally in the reasons set forth in the judgment just delivered.

In view, however, of the remarks made by my learned brother, I should like to add, that although the correctness of the decision of this Court in the case of *Raghunundum Misser v. Kallydutt Misser*(1) does not properly arise in this case, I do not share the doubt entertained by him on this subject.

There are several routes by which execution of a decree can be attained, and the words "to take some step in aid of the execution of a decree," in my opinion, mean to reach a further point along one of those routes, or, to use the language of this Court in the case of *Umesh Chunder Dutta v. Soonder Narain Deo*(2), "to obtain some order of the Court in furtherance of the execution of the decree." I do not regard the removal from the decree-holder of the prohibition to bid as coming within the meaning of the words. The point already reached in the execution of the decree is a sale of property; and the removal of the prohibition does not in my opinion carry the Court to any further point along the path of execution.

M. N. R.

*Appeal allowed.*

(1) (1869) I. L. R. 23 Calc. 690.

(2) (1889) I. L. R. 16 Calc. 747.

## PARASHMONI DASSI

v.

## NABOKISHORE LAHIRI.\*

1903

May 13, 21.

*Land Registration—Land Registration Act (Bengal Act VII of 1876) ss. 42, 72—  
Co-sharer's interest by amicable settlement—Registration of proprietor's  
share—Partition Act (Bengal Act V of 1897) s. 12.*

The Land Registration Act (B.C. VII of 1876) requires the registration by the various proprietors of their shares in the estates only, and does not seem to contemplate a registration of shares in separate mouzahs in the estates. The provisions of section 42 of the Act have therefore no application to the case of a co-sharer who, by an amicable arrangement between the co-sharers, has been placed in possession of a larger share than his registered share in some mouzahs, and of a less share or no share in others, so long as the total interest which he holds in all the mouzahs represents his registered interest in the whole estate.

SECOND APPEAL by defendant, Parashmoni Dassi.

This appeal arose out of an action brought by the plaintiff to recover an eight-anna share of rent from the defendants in respect of a jote held by them in mouzah Giriassa. The allegation of the plaintiffs was that they and one Promoda Debi were the proprietors of an one-anna odd ganda share in estate No. 136, Pergana Susang; that under an amicable arrangement with their co-proprietors they and Promoda Debi were in possession of the whole of Giriassa, one of the mouzahs in the estate, as their *khanabari*; that they collected their eight-anna share of the rents from the tenants in the mouzah up to 1301 B.S., and that the defendants not having paid their rents, the suit was brought to recover arrears for the years 1301 to 1304 B.S. The defence mainly was that the plaintiffs could not recover more than one anna odd ganda share of the rent, that being the share in respect of which their names were registered in the estate; they also disputed the amount of the *jama* claimed.

\* Appeal from Appellate Decree No. 2063 of 1900, against the decree of Dwarkanath Mitter, Subordinate Judge of Mymensingh, dated June 28, 1900, reversing the decree of Jogesh Chunder Mukerjee, Munsif of Netrokona, dated March 13, 1899.

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The Court of First Instance gave the plaintiffs a modified decree. The plaintiffs appealed to the Subordinate Judge of Mymensingh, who set aside the judgment and decree of the First Court, and decreed the plaintiffs' claim in full.

*Dr. Ashutosh Mookerjee (Babu Biraj Mohun Majumdar with him)* for the appellant. Under s. 78, paragraph 2 of the Land Registration Act, the plaintiff is not entitled to collect rent for any share in excess of the share for which he is registered. Plaintiff is not entitled to succeed by showing that although his name is registered in respect of a certain share of the entire zemindari, he is entitled by virtue of an amicable arrangement with his co-sharers to collect a larger share of the rents from the tenants of a particular village. To allow the plaintiffs to do so would be to defeat the object of the law and nullify the protection afforded to the tenants. There is nothing in the Act to prevent the plaintiff from getting himself registered in respect of different shares in the several villages included within the estate. S. 42 of the Act lends support to my contention.

*Babu Jogesh Chunder Roy* for the respondent. The second paragraph of s. 78 of the Land Registration Act contemplates a case in which a tenant is liable to pay rent to more than one proprietor holding in common tenancy. It is therefore no bar to a co-sharer in a case like the present where by an amicable arrangement the whole body of the proprietors is not entitled to realise rent from all the tenants, to get rent in respect of the share of a mouzah which he is in possession of. Such an amicable arrangement is not precluded by s. 78 of the Act. Moreover, the Act does not contemplate the possibility of a proprietor getting himself registered in respect of specific lands or shares in specific lands comprised in the estates.

*Dr. Ashutosh Mookerjee* in reply.

*Cur. adv. vult.*

**MAY 21. BERTT AND MITRA JJ.** The plaintiffs sued to recover from the defendants an eight-anna share of the rent due from them for the years 1801 to 1804 in respect of a jote held by them in mouzah Giriassa.



The plaintiffs and one Promoda Debi are the proprietors of an one-anna odd ganda share in estate No. 136, Pergana Susang, and their case is that under an amicable arrangement with their co-proprietors they and Promoda Debi are in possession of the whole of Giriassa, one of the mouzahs in the estate, as their *khanabari*. They further allege that they have collected an eight-anna share of the rents from all the tenants in the mouzah for nine or ten years down to 1801, and they therefore sue to recover rents for the years in suit.

The defendants disputed the amount of *jama* claimed, and further pleaded that plaintiffs were not entitled to recover from them more than 1a. 10g 1c. 1ka. share of the rent, that being the share which they held in the estate.

The Munsif found that the *jama* of the defendants was that stated by the plaintiffs, but he accepted the latter plea put forward by the defendants and gave the plaintiffs a decree for an 1a. 10g. 1c. 1ka. share only of the rent against the defendants.

On appeal the Subordinate Judge set aside the judgment and decree of the Munsif, and decreed the plaintiff's claim with costs. The defendants have appealed.

A preliminary objection was taken under section 153(a) of the Bengal Tenancy Act to the competency of the appeal on the ground that the rent which the plaintiff sought to recover was under 100 rupees, and the judgment of the Full Bench in the case of *Narain Mahton v. Munafi Patluk*(1) laid down that the provisions of that section applied to the case of rent payable to one of several co-sharer landlords who collected his share of the rent separately. In this case, however, the question raised and determined was not merely the amount of rent payable to the co-sharer, but whether he had a title to recover the eight-anna share of the rents of mouzah Giriassa as he alleged. This comes under the exception mentioned in the section, and the objection fails.

In support of the appeal the learned vakil for the appellants relies on the second part of section 78 of the Land Registration Act of 1876, and contends that under its provisions the defendant is not bound to pay any co-sharer more than the amount which

(1) (1890) I. L. R. 17 Cal. 499.

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bears the same proportion to the whole of his rent as the extent of the interest in respect of which that co-sharer is registered bears to the entire estate. The plaintiff admittedly is only registered as proprietor in respect of an *1a. 10g. 1c. 1ka.* share in estate No. 136, in which mouzah Giriassa is situated, and the learned vakil contends that the Munsif was right in holding that the plaintiff could only recover that share of the rent from the defendant and that the decision of the Subordinate Judge to the contrary was wrong. He further relies on the provisions of section 42 of the same Act, and contends that if the plaintiff by any arrangement with his co-sharers came into possession of an eight-anna share of mouzah Giriassa, he was bound to have had his name registered in respect of that share in that mouzah before he could recover an eight-anna share of the rents from the tenants. The contention appears not to have been raised in any suit before, and there can be no doubt that if it be sound, its effect would be very far reaching in Bengal, where arrangements similar to that relied on by the plaintiff are very common.

We do not, however, consider that in this case we are called on to determine the broad proposition which has been put forward. Both the Lower Courts have found that there was an amicable arrangement between the co-sharers by which the plaintiffs were placed in possession as their *khanabari* of an eight-anna share of mouzah Giriassa, and that they collected an eight-anna share from the tenants for eight or nine years up to 1301. The Munsif held, relying on a document produced by the defendant, that in that year there was a fresh settlement between the plaintiff and defendant, by which the plaintiff agreed thenceforward to collect only his registered share of the rent, but the Subordinate Judge has found that document not to be genuine, and has held that there was no such fresh settlement. With that finding we cannot interfere.

The Act requires the registration by the various proprietors of their share in the estates only, and does not seem to us to contemplate a registration of shares in separate mouzahs in the estates, and we hold therefore that the provisions of section 42 of the Land Registration Act have no application to the case of a co-sharer who, like the plaintiff, has, by an amicable arrangement

between the co-sharers, been placed in possession of a larger share than his registered share in some mouzahs and of a less share or no share in others, when the total interest which he holds in all the mouzahs represents his registered interest in the whole estate. Section 12 of the Partition Act clearly contemplates that such a partition by amicable arrangement may be made.

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Whether the tenants would be bound without their consent by such an arrangement is not a question which arises in this case, for it is evident that the defendant and other tenants acquiesced in the arrangement and paid rents in accordance therewith for eight or nine years, prior to the period for which the rents in suit are claimed. And the defendant having so acquiesced, we are of opinion that he is now debarred from disputing the plaintiff's right to a half-share of the rent and from relying on the provisions of section 78 of the Land Registration Act.

In this case a lessee of the registered proprietor is in possession of the remaining share of the estate, and he is clearly endeavouring by setting up the defendant to put forward his defence in this case to annul the previous amicable arrangement among the co-sharers.

We hold therefore that the judgment and decree of the Subordinate Judge is right, and dismiss the appeal with costs.

S. C. G.

*Appeal dismissed.*

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May 6, 15.

## AHSANULLA

v.

## MANJURA BANOO.\*

*Arrears of cess—Cess Act (Bengal IX of 1880) s. 99—Cess whether a charge on an estate.*

The amount of cesses payable to a Collector under the Cess Act (IX B.C. of 1880) is not a charge on the estate in respect of which they are due.

*Shekaat Hosain v. Sasi Kar*(1) referred to; *Chatraput Singh v. Grindra Chunder Roy*(2) discussed.

SECOND appeal by the plaintiff, Nawab Ahsanulla.

This appeal arose out of an action brought by the plaintiff to recover a certain sum of money from the defendants, Manjura Banoo and others. The allegation of the plaintiff was that revenue-paying taluk Hussainaddi of the Tipperah Collectorate formerly belonged to one Golam Mowala, the husband of defendant No. 1 and father of defendants Nos. 2 and 3; that in execution of a mortgage decree obtained against Golam Mowala, the said taluk was sold and purchased by him on the 16th August 1897, and the sale was confirmed on the 5th March 1898; that for arrears of road cess due up to March 1897 the Collector of the district filed a certificate against the defendants, but no property belonging to the debtors having been found, the Collector took proceedings under s. 99 of the Cess Act; that thus he was obliged to pay the cess due, and hence was this suit to recover the said amount from the defendants.

The defence mainly was that the payment being a voluntary one, the plaintiff was not entitled to be reimbursed; and that the cesses being a charge on the estate, the plaintiff was bound to pay.

\* Appeal from Appellate Decree No. 2250 of 1900, against the decree of Sham Kishore Bose, Subordinate Judge of Tipperah, dated Aug. 27, 1900, affirming the decree of Ram Lal Das, Munsif of Comilla, dated Dec. 22, 1899.

(1) (1892) I. L. R. 19 Calc. 783.

(2) (1880) I. L. R. 6 Calc. 389.

The Court of First Instance having held that the payment made by the plaintiff was voluntary dismissed the suit. On appeal, the Subordinate Judge of Tipperah, holding that although the payment by the plaintiff was not voluntary, yet the cesses being a charge on the estate the plaintiff was bound to pay, confirmed the decision of the first Court.

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*Dr. Ashutosh Mookerjee (Babu Surendra Nath Guha with him).*

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The question in this case is whether cess is a charge upon the property. Although the Collector took proceedings under s. 99 of the Cess Act, yet it could not be a charge. Ss. 41 and 42 of the Act show that the liability is a personal liability only. S. 45 provides that the arrears of cesses are recoverable within three years; s. 98 provides that the amount may be recovered as a public demand. If so recovered, it is recovered only as a personal debt. The case of *Shekaat Hosain v. Sasi Kar*(1) supports my contention. Looking into the scope of the Act, it could not be said that cesses are a charge upon property. Even if they are taken to be a charge, it ceases to be so as soon as the debt is satisfied. Under s. 99 of the Act notification is to last as long as the arrears are not realized.

*Moulvi Shamsul Huda* for the respondent. My client was not bound to pay the cesses. Cess is generally a charge upon the property. From the preamble of the Cess Act it appears to be so. It is an Act which provides for the levying of road cess and public works cess on immoveable property. S. 5 says that an immoveable property shall be liable to the payment of a road cess and a public works cess. So it appears that the initial liability is the immoveable property upon which cesses are levied. There are two modes of realizing cesses—*first*, by certificate, and, *secondly*, by proceeding against the property. S. 99 of the Cess Act provides that it is not necessary to issue a certificate; the Collector may proceed direct against the property. S. 99 does not for the first time create a charge: it only says what will be the nature of the charge. Charge is really created by the provisions of s. 5 and the preamble of the Act. Even if s. 99 for the first time creates a charge, the plaintiff's right to contribution does not arise. The

(1) (1892) 1 L. R. 19 Calc. 783.

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present question was not considered in the case of *Shekaat Hosain v. Sasi Kar*(1). In that case the real question was, what was the effect of a sale in execution for road cess? The case of *Chatraput Singh v. Grindra Chunder Roy*(2) is an authority in my favour.

In the Revenue Sale Law nowhere is it said that revenue is a charge upon the property, except that there is that section where it is said that the purchaser at a revenue sale purchases free of all encumbrances. It does not at all show that cess is a personal liability, for the mere fact that in the Cess Act it is not mentioned that the purchaser buys free of all encumbrances. For the purposes of contribution cess is a charge upon immoveable property. Supposing initially it is not a charge, no sooner the Collector proceeds under s. 99, it becomes a charge. In the case of *Shekaat Hosain v Sasi Kar*(1) no proceeding under s. 99 was taken, and therefore no charge was created. But in this case, proceeding under s. 99 was taken. In deciding what is or is not a charge, a Court should not take into consideration under what procedure the Collector proceeded. The fact that the Collector may proceed one way or other is not the test to decide whether cess is a charge or a personal liability.

Dr. Ashutosh Mookerjee in reply.

Cur. adv. cult.

May 15

BRETT AND MITRA JJ. The plaintiff purchased a revenue-paying estate then belonging to the defendants in execution of a mortgage decree, and the sale was confirmed on the 5th March 1898. The defendants had not paid to the Collector the amount of cesses due under Act IX (B.C.) of 1880 up to March 1897, and after the purchase by the plaintiff, the Collector proceeded to realize the same under section 99 of the Act. The plaintiff had to pay up the amount, and he then instituted the present suit for recovering it from the defendants.

The lower Courts have held that the amount of cesses payable by the holder of an estate under Act IX (B.C.) of 1880 is a charge on it, and the plaintiff having purchased subject to all

(1) (1892) I. L. R. 19 Calc. 783.

(2) (1880) I. L. R. 6 Calc. 389.

existing charges was not entitled to be reimbursed by the defendants.

The decision in this case depends on the answer to the question, whether before a Collector proceeds under section 99 of the Cess Act, the amount payable to him as cesses is a charge on an estate.

In *Shekuat Hosain v. Sasi Kar*(1) it was held that an amount due on account of cesses under the Bengal Cess Act, 1880, was only a personal debt and could not properly be recovered from the property on which it was assessed, if it should so happen that the property belonged to a third person.

The ordinary mode of recovering the amount from the holder of an estate is by means of a certificate under the Public Demands Recovery Act, which has the effect of a personal action against the debtor named in the certificate. There is no provision in the Cess Act, IX (B. C.) of 1880, except section 99, which we shall presently consider, making the amount recoverable by the Collector a charge on the estate in respect of which it is due. In cognate Acts relating to the dues of the State there are express provisions for the avoidance of encumbrances on sales for the recovery of such dues or words expressly making such dues charges on land. We may refer to section 37 of Act XI of 1859, section 12 of Act VII (B. C.) of 1868 and section 15 of Act XXXVI of 1871 as amended by Act XXI of 1876.

We do not think that the words in section 5 of the Cess Act, 1880, "all immoveable property shall be liable to the payment of a road cess or a public works cess" are sufficient in themselves to lead us to conclude that the amount assessed as cesses is a charge.

Under section 99 of the Act, the Collector has the power to recover any sum due under the Act from the tenants in an estate, after recording a proceeding and giving notice to the tenants to that effect. It is a power in the nature of a right to attach the rents payable to the person from whom the dues are recoverable. The Collector by recording a proceeding under section 99 constitutes himself a Receiver for the collection of dues to the State. It does not appear that the Collector has the power to realize the amount by the sale of the estate, as if it was a charge

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(1) (1892) I. L. R. 19 Cal. 783.

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having priority over other charges. In the last clause of section 99, the priority of the claim for the arrears of cesses "over any other demand or claim or lien" existing upon any estate or tenure attaches, if and when the Collector sees fit to proceed under the first clause of the section.

The charge contemplated by the last clause is not one ordinarily existing on an estate, but becomes one only on the Collector's taking action under the first clause. Section 99, it seems to us, shows that an amount recoverable as cesses under the Public Demands Recovery Act is not ordinarily a charge.

Chatraput Singh v. Grindra Chunder Roy(1) is not in conflict with the view taken by us. The question raised before us was not raised in that case, and there is only a stray observation in the judgment of White J., that "revenue and cesses constitute a standing encumbrance and first charge on the land subject to them." Cesses were then levied under Bengal Acts X of 1871 and II of 1877, and these Acts have now been replaced by Bengal Act IX of 1880. The defendants in that case were exonerated from liability to pay the amount deposited by the plaintiff as revenue and cesses on the main ground that they had become due after the purchase by the plaintiff, and the decision of the question whether cesses constitute a charge was not necessary and was not shared in by Field J.

In the present case the amount of cesses levied by the Collector was payable by the defendants as a personal debt, and the plaintiff was compelled to pay it on account of the proceedings taken under section 99 of the Cess Act. We think the plaintiff is entitled to be reimbursed; and this appeal is, therefore, decreed with costs in all Courts.

Appeal allowed.

S. C. G.

(1) (1880) I. L. R. 6 Calo. 389.

KALI CHARAN GHOSAL

v.

RAM CHANDRA MANDAL.*

1903
May 11.

Evidence—Secret trust—Will—Unregistered agreement—Registration Act (III of 1879) s. 17, sub-ss. (b), (h)—Non-testamentary document—Admissibility of Evidence.

A party setting up a secret trust must adduce evidence to prove that it was communicated by the testator to the universal legatee, and that the legatee agreed to accept the property bequeathed on the terms of the trust.

Jones v. Badley(1) referred to.

In proceedings for obtaining Letters of Administration, the parties having settled their disputes presented a petition to the Court to the following effect:—"That I, Gyanoda Sundari Dassi, will get 10-anna share of all the moveable and immoveable properties left by Kristomoni, deceased, and I, Ishwar Chandra Sarkar, will get the remaining 6-anna share." . . . "Be it explicitly expressed that after taking out the Letters of Administration I, Gyanoda Sundari Dassi, shall amicably take 10-anna share, and I, Ishwar Chandra Sarkar, shall take 6-anna share of the moveable and immoveable properties after dividing the shares by demarcation." No order was made on this petition. The properties were of the value of over hundred rupees :—

Held, that the petition, unless registered, would be inadmissible in evidence.

Pranal Anni v. Lakshmi Anni(2) referred to.

SECOND appeals by the defendants, Kali Charan Ghosal and another.

These two appeals arose out of an action brought by the plaintiffs to recover possession of 25 bighas of land on establishment of their title thereto. The allegation of the plaintiffs was, that one Kristomoni Dassi on the 17th Chait 1287 B. S. (29th March 1881) executed a will in favour of her two brothers, Ishwar and Sridhar; that Sridhar died, leaving a son, Lalit Mohun, and a daughter, Gyanoda Sundari; that on the 30th Sraban

* Appeals from Appellate Decrees Nos. 2286 and 2478 of 1900, against the decree of W. Knox, District Judge of Murshidabad, dated Aug. 29, 1900, reversing the decree of Saroda Prosad Bose, Munsif of Jangipore, dated Oct. 8, 1899.

(1) (1868) L. R. 3 Ch. A. C. 362. | (2) (1899) I. L. R. 22 Mad. 508;
L. R. 26. I. A. 101.

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1300 B. S. (14th August 1893) Kristomoni executed a second will revoking the first, and bequeathing all her property to Gyanoda Sundari; that after Kristomoni's death both Ishwar and Gyanoda Sundari applied for Letters of Administration; that on the 3rd February 1894, Ishwar and Gyanoda filed a petition of compromise, and in this they stated that they arranged to divide the property, Gyanoda taking a 10-anna share and Ishwar a 6-anna share of the property; that the opposition to the second will and to Gyanoda's application was withdrawn, and after evidence had been taken, Letters of Administration with a copy of the will of the 30th Sraban 1300 (14th August 1893) annexed, were granted to her on the 2nd March 1894; that on the 22nd August 1894, by a registered deed of sale, Gyanoda sold the lands in dispute to them, the plaintiffs; that they were dispossessed by the defendants in Aughrayan 1301 B. S.; and hence the suit.

The defence, *inter alia*, was that in the will of the 30th Sraban 1300 (14th August 1893) Gyanoda Sundari was only a *benamdar* for her brother, Lalit Mohun, who was, and was intended to be, the real beneficiary; and that by virtue of the will and of the compromise of the 3rd February 1894 Lalit Mohun became owner of the 10-anna share and Ishwar of the remaining 6 annas, both of whom by a deed dated the 13th Bhadro 1301 B.S. (28th August 1894) sold their properties to the defendants, and within which the lands in dispute were included.

The Court of First Instance, having held that no evidence could be given to show that Lalit Mohun was the real beneficiary under the will, and that by virtue of the compromise dated the 3rd February 1894 Gyanoda Sundari was only entitled to a 10-anna share of the property, gave the plaintiffs a modified decree. Against this decision both the plaintiffs and the defendants appealed to the District Judge of Murshidabad, who decreed the appeal of the plaintiffs, but dismissed that of the defendants.

*Dr. Rash Behary Ghose* and *Babu Shoshi Shekhar Bose* for the appellants. Evidence may be given to shew that the will was really intended for the benefit of a person other than the one mentioned therein, in the same way as oral evidence is admissible

to prove the benami nature of a transaction in the case of sale or gift: see *Jones v. Badley*(1).

The document purports to be a petition of compromise; it is a joint-petition in which they recite the agreement arrived at between the parties. That being so, it is not a written instrument conveying, or purporting to convey, immoveable property. The provisions of s. 17 of the Registration Act do not apply to oral transactions. This document does not fall under the Registration Act at all. The provisions of s. 17 of the Registration Act do not apply to judicial proceedings, whether pleadings of parties or orders of Court: see *Binderi Naik v. Ganga Saran Sahu*(2). Pleading referred to in this case was a *sulehnama*. By the *sulehnama* there was only a written admission before the Judge, but the agreement was oral. If the two parties go to the Judge and say, as in this case the parties did, that "we have entered into an agreement, give us Letters of Administration jointly," it cannot be said that the effect of this would be giving any interest in immoveable property within the meaning of the Registration Act; so the *sulehnama* did not require to be registered. In this case equitable title ought to prevail against the plaintiffs.

*Dr. Ashutosh Mookerjee* and *Babu Charoo Chandra Ghose* for the respondents. By the *sulehnama* the parties actually divided the properties amongst themselves. This is a document which declares a title in immoveable property, so it requires to be registered. Assuming that the document was admissible in evidence, no suit could be brought to enforce specific performance, as it was barred by limitation. I rely upon the case of *Pranal Anni v. Lakshmi Anni*(3). There is no authority for the proposition that evidence can be given to shew that the will was not intended for the legatee mentioned therein, but for some other object. The principle laid down in s. 92 of the Evidence Act covers this case.

*Dr. Rash Behary Ghose* in reply. No question of limitation can arise in this case, as limitation could run from the date when

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(1) (1898) L. R. 3 Ch. A.C. 362.

(2) (1897) I. L. R. 20 All. 171; L. R. 25. I. A. 9.

(3) (1899) I. L. R. 22 Mad. 508; L. R. 26 I. A. 101.

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specific performance is demanded and refused: see Article 113 of the Limitation Act.

**MACLEHAN C.J.** The first question which arises on this appeal is whether it is open to the defendants to shew that one Gyanoda Sundari, who was the predecessor in title of the plaintiffs, and under the will of Kristomoni Dassi, dated the 14th of August 1893, her universal legatee, was really a trustee for the testatrix's nephew, Lalit Mohun Sarcar, through whom the defendants claim the property given by the will.

There is no authority in India upon the subject, statutory or otherwise; and, in the absence of any such authority, I doubt if it be open to the defendants to adduce such evidence, unless we act in India upon the principle which, in cases of this class, is acted upon in the English Courts. In the English Courts it is open to those who claim the benefit of a secret trust to show that a gift by will, say to A, is really given to A on a secret trust for B. But it is an undoubted element in that class of cases that the party setting up such a secret trust must show that the trust was communicated to A by the testator, and that A agreed to accept the property on those terms. If then we were to apply this English doctrine to Indian cases, we must apply the whole; and in the present case it is admitted that there was no evidence to shew that any such trust was communicated to Gyanoda Sundari, or that she accepted the property upon the terms of her being a trustee. I, therefore, decide the first point against the appellant; the view taken in England is stated with great lucidity by Lord Cairns in the case of *Jones v. Badley* (1).

I now pass to the second point. It is of an entirely different description. The second point is that what has been spoken of throughout the discussion as in the *sulehnama* of the 3rd of February 1894 was not admissible in evidence because it was not registered. The facts as to that are these: Kristomoni Dassi had made a will previous to that of the 14th of August 1893, and by that will, which is dated the 17th of Chaitra 1287, she gave her property to her two brothers, Ishwara and Sridhara; Sridhara died leaving a son, Lalit Mohun, to whom I have already

(1) (1868) L. R. 3 Ch. A. C. 362.

referred, and his sister, Gyanoda Sundari. After Kristomoni's death Ishwara propounded the first will and Gyanoda propounded the second will. Each applied for Letters of Administration. They then presented this document of the 3rd of February 1894 by way of a petition to the Court. It was signed both by Gyanoda and Ishwara. No order was made on the petition: on the contrary, the Court said it could not act upon it, and Letters of Administration with the will annexed were granted to Gyanoda. The question is whether this document falls within sub-section (b) or sub-section (h) of section 17 of the Indian Registration Act. It recited the facts I have stated, as well as the two applications for probate, and then it said: "The above two cases have been amicably settled amongst us on the terms following:— that I, Gyanoda Sundari Dassi, will get a ten-anna share of all moveable and immoveable properties left by the said Kristomoni, deceased, and I, Ishwara Chandra Sarkar, will get the remaining six-anna share." After these allegations, the prayer was that Letters of Administration might be granted to the two. Then it says: "Be it explicitly expressed that, after taking out the Letters of Administration, I, Gyanoda Sundari Dassi, shall amicably take ten-anna share, and I, Ishwara Chandra Sarkar, shall take six-anna share of the moveable and immoveable properties after dividing the shares by demarcation." No order was made upon this application. This instrument is a non-testamentary instrument: the question is whether it purports or operates to create or declare any right, title or interest in any immoveable property of the value of over 100 rupees. It is conceded that the property here is over that amount. I think it clearly purports or operates to create or declare the rights and interests of the brothers and sister in the property in dispute, and consequently that it required to be registered. I do not see how we can fairly bring this document within sub-section (h), and say that it creates a right to obtain another document, which will when executed "create, declare, assign or extinguish any such right, title or interest." There is no reference to the execution of any other document. The case is governed in principle by the Privy Council decision in the case of *Pranal Anni v. Lakshmi Anni*(1).

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(1) (1899) I. L. R. 22 Mad. 508; I. R. 26. I. A. 101.

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Lastly, it was said that the plaintiffs had notice of this agreement. I do not think that helps the defendant. There is no finding upon that one way or the other. If they had, they would only have notice of an agreement which required registration, and which without registration would be inadmissible in evidence against them.

Those are the only points argued, and, in my opinion, they fail, and the appeals must be dismissed with costs.

GRIFFITH J. I concur.

S. C. G.

Appeals dismissed.

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 June 11.

**ZINNATUNNESSA KHATUN**  
 v.  
**GIRINDRA NATH MUKERJEE.\***

*Declaratory decree—Consequential relief—Court-fees Act (VII of 1870), Sch. II, Art. 17, cl. (iii) and s. 7, cl. iv (c).*

A suit in which the only prayer is to have it declared that a certain decree is ineffectual and inoperative against the plaintiffs, is a suit for a declaratory decree without consequential relief and falls within Sch. II, Art. 17, cl. (3) and not under s. 7, cl. 4 (c) of the Court-fees Act (VII of 1870).

*Shrimant Sagajirao v. Smith* (1) relied upon.

**APPEALS** by the plaintiffs, Zinnatunnessa Khatun and another.

These two appeals arose out of two suits brought by the plaintiffs to have it declared that the decrees in civil suits Nos. 12 and 13 of 1889, of the Subordinate Judge of Faridpore, were ineffectual and inoperative as against the plaintiffs. The prayers in the two plaints were the same and to the following effect:—"It was accordingly prayed that it might be declared that the decree in civil

\* Appeals from Original Decrees Nos. 1 and 2 of 1901, against the decrees of Kali Dhan Chatterjee, Additional Subordinate Judge of Faridpore, dated Sept. 10, 1900.

(1) (1895) I. L. R. 20 Bom. 736.

suits Nos. 12 and 13 of 1889, of the Subordinate Judge of Faridpore, and the ascertainment of the mesne profits and the proceedings connected with it were ineffectual and inoperative against the plaintiffs, and that the plaintiffs were not bound by the same." The plaint was filed with a court-fee of Rs. 10, although the suit was valued at Rs. 7,013-12-5-0 $\frac{1}{4}$ . On the 25th August 1900, the Subordinate Judge passed the following order:—

"In this suit and in its analogous suit No. 12 of 1900 plaintiff's prayer is to make some decrees of *wasilat* inoperative and not binding against her. In the plaints each of these suits is valued at Rs. 7,013-12-5 $\frac{1}{4}$  pies. As I have doubt regarding the value of plaintiff's suits, yesterday I heard the pleader of both sides, and plaintiff's pleader, Tara Nath Babu, stated before me the value of the suits had been correctly given in the plaint as regards jurisdiction to be Rs. 7,013-12-5 $\frac{1}{4}$  pies in each of them. In each case, however, the plaint was filed on Rs. 10 court-fee, which is the court-fee required where declaratory decree without consequential relief is prayed for. This prayer of these suits clearly shows consequential relief was prayed for, inasmuch as the plaintiff has prayed for a declaration that she may be absolved from the liability of certain decree. So although the wording of plaintiff's prayer is clothed in the form which apparently shows it has been made to obtain a declaratory decree only, yet it is evident from the plaintiff's prayer that her main object is to annul the effect of the *wasilat* decree. I think therefore consequential relief of the value of the decree has been prayed for in each of these suits, and as such, under section 7, sub-section (4), clause (c) of the Court-fees Act, plaintiffs ought to pay court-fee for plaint according to the amount at which relief is sought in her plaint. Plaintiff therefore must pay the deficit court-fee of her plaint by the 10th September 1900."

On the 10th September 1900, the plaintiff's pleader not having paid the deficit court-fee, the learned Subordinate Judge rejected the plaints.

*Babu Basanta Kumar Bose, Dr. Ashutosh Mookerjee and Babu Surendra Nath Gupta* for the appellants in appeals Nos. 1 and 2.

*Babu Harendra Nath Mookerjee and Babu Charoo Chunder Ghose* for the respondent in appeal No. 1.

*Babu Jogesh Chander Koy, Babu Harendra Nath Mookerjee and Babu Charoo Chunder Ghose* for the respondents in appeal No. 2.

**MACLEAN C.J.** These appeals must be allowed.

The case appears to me to fall within Article 17 of the Second Schedule to the Court-fees Act of 1870, sub-section (iii), and not

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under section 7, sub-section (iv), clause (c). The safest course in these cases is to ascertain what the plaintiff actually asks for by his plaint, and not to speculate upon what may be the ulterior effect of his success. It may very well be that as the result of setting aside the decree in question, some ulterior benefit may directly or indirectly flow to the plaintiff. But what we have to look at is what he asks for by his plaint. It is clear looking at the plaint that all that the plaintiff asks for is a declaratory decree, and he does not ask for any consequential relief. The case of *Shrimant Sugajirao Khanderao Naik Nimbalkar v. Smith*(1) accords with this view.

The appeals must therefore be allowed. The court-fee paid was sufficient, and the plaintiff must be allowed to go on with the suits. The appellant is entitled to his costs in these appeals.

**GRIFFITH J.** I concur.

*Appeals allowed.*

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(1) (1895) I. L. R. 20 Bom. 786.

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 June 4.

SARAT CHANDRA DEY

v.

BROJESHWARI DASSI.\*

*Limitation—Limitation Act (XV of 1877) ss. 4, 5, 12 and Sch. II, Art. 170—  
 “Appeal”—Leave to appeal in forma pauperis.*

The word “appeal” in s. 5 of the Limitation Act (XV of 1877) does not include an application for leave to appeal in *forma pauperis*.

*Lakshmi v. Ananta Shanbaga*(2) and *Parbati v. Bhola*(3) referred to.

APPEAL by the defendants, Sarat Chunder Dey and another.

This appeal arose out of an action brought by the plaintiff, Brojeshwari Dassi, against the defendants to enforce a mortgage bond. The bond was executed in favour of the plaintiff by the

\* Appeal from Original Decree No. 109 of 1900, against the decree of Prasanna Kumar Ghose, Subordinate Judge of Nadia, dated July 20, 1899.

(2) (1879) I. L. R. 2 Mad. 230.

(3) (1889) I. L. R. 12 All. 79.



defendants on the 21st Falgoon 1297 B.S. (4th March 1891) and was duly registered. The defence mainly was that the suit was not maintainable by the plaintiff, as she was only a *benamdar* for her deceased husband, and that the full consideration for the bond did not pass to them. The Court of first instance having overruled the said objections decreed the suit on the 20th July 1899.

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The defendants not being able to prefer an appeal against the said decree on payment of proper court-fees, applied, on the 20th November 1899, to the High Court for leave to appeal in *formâ pauperis*. This application was heard on the 27th November 1899, and the following order was passed :—"Subject to the enquiry to be made by the Lower Court in the pauperism of the appellants, the petitioners will be allowed to prosecute the appeal as paupers." The enquiry by the Lower Court having been made, the High Court, on the 2nd April 1900, made the following order in the presence of the vakils of both the appellants and the respondent : "By an order of this Court, dated the 27th November last, the applicants were, subject to the results of an enquiry by the Lower Court into their pauperism, allowed to appeal in *formâ pauperis*. The enquiry has since been made, and the last report of the Court below is in favour of the applicants. That being so, we allow the petitioners to prosecute this appeal in *formâ pauperis*, and we direct that the appeal be registered."

On the appeal coming on for hearing,

*Dr. Ashutosh Mukherjee* (*Babu Sarat Chandra Khan* with him), for the respondent, took a preliminary objection to the hearing of the appeal on the ground that the application for leave to appeal in *formâ pauperis* was not made in time under Art. 170 of the Second Schedule to the Limitation Act, and that the *ex-parte* order made allowing the appellants to appeal in *formâ pauperis* could not properly have been made. The application was out of time, and under s. 4 of the Limitation Act it should have been rejected. The Court could not extend the time : see the cases of *Lakshmi v. Ananta Shanbaga*(1) and *Parbati v. Bhola*(2). S. 12 of the Act expressly mentions an application for leave to appeal as a pauper, but s. 5, cl. (2) is silent as to such

(1) (1879) I. L. R. 2 Mad. 230.

(2) (1889) I. L. R. 12 All 79.

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application. S. 5 therefore was not intended to apply to such an application.

*Babu Golap Chunder Sarcar* for the appellants. The order of the 2nd April 1900 was made in the presence of the *vakil* for the respondent, and no objection was then taken on the ground now urged. That order is an existing one, and the Court should not go behind that order. Besides, the word "appeal" in s. 5, cl. (2) of the Limitation Act should be taken to include an application for leave to appeal in *forma pauperis*, and the Court has power under that section to extend the time. The application was not made in time out of a *bona-fide* mistake, and the Court having admitted the appeal should not now re-open the question.

**MACLEAN C.J.** A preliminary objection has been taken to the hearing of this appeal, namely, that the order of this Court of the 27th November 1899, which was made *ex-parte*, giving the appellant leave to appeal in *forma pauperis* was out of time, and, consequently, that order could not properly have been made. The order runs in these terms:—"Subject to the enquiry to be made by the Lower Court in the pauperism of the appellant, the petitioner will be allowed to appeal as a pauper;" that is dated the 27th of November 1899. On the 2nd of April 1900, after the present respondent had been present at the enquiry as to pauperism, an order was made in his presence, allowing the petitioner to prosecute the appeal in *forma pauperis*. The contention of the respondent is that that order could not properly have been made, having regard to the dates of the proceedings. The decree of the Court below was made on the 20th of July 1899, and was signed on the 22nd July. Under Article 170 of the Second Schedule to the Indian Limitation Act, the period for applying for leave to appeal as a pauper is thirty days from the date of the decree appealed against. The period would, therefore, run from the 22nd of July and would expire on the 21st of August; but under section 12 of the Limitation Act, the applicant was entitled to certain allowances of time, and the last date for the application for leave to appeal in *forma pauperis* became the 29th of August. The application was not made until the 20th of November, and, as I have said, the *ex-parte* order was made on the 27th of November 1899.

It is clear that, when the application was made, the applicant was out of time. But it is said that it is open to the Court to extend the time under paragraph 2 of section 5 of the Limitation Act. I do not think that is so. That section only applies to an appeal or application for review of judgment, either of which may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period. We are asked to hold that the expression "appeal" includes an application for leave to appeal in *forma pauperis*. It would be straining the language of the section if we put that construction upon it. In section 12 an application for leave to appeal as a pauper is expressly included, whilst it is excluded from section 5. This view has been held in the case of *Lakshmi v. Ananta Shanbaga*(1) and of *Parbati v. Bhola*(2). In those cases no special application was made to discharge the order which had been made out of time.

It must be borne in mind that under section 4 of the Limitation Act, the Court is bound when an application is out of time to dismiss it, even although the point may not be raised by the other side. I think, however, that there ought to have been a special application made to set aside the orders admitting the application; and we only allow the preliminary objection upon the undertaking of the respondent to present a petition before Wednesday next, the 10th instant, asking for the discharge of these orders.

I do not, however, wish to exclude the appellant from appealing if he choose to proceed in the ordinary way, and not as a pauper, though he is much out of time. We can, however, extend the time for appealing; and if by Wednesday next he puts in the court-fee on the memorandum of appeal, we will hear the case on the merits.

**GRIFFITH J.** I concur.

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(1) (1879) I. L. R. 2 Mad. 230.

(2) (1889) I. L. R. 12 All. 79.

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 May 20.

## UPENDRA CHANDRA MITTER

v.

## TARA PROSANNA MUKERJEE.\*

*Revenue Sale—Act XI of 1859, s. 9—Act I of 1845—Mortgagee—Part-proprietor—Mortgage lien—Transfer of Property Act (IV of 1882) s. 72—Cesses—Personal decrees—Contract Act (IX of 1872) s. 70—Miejoinder—Civil Procedure Code (Act XIV of 1882) s. 578.*

A mortgagee of a share of an estate, who was also a part-proprietor, deposited in the Collectorate revenue and cesses payable by the defaulting mortgagor to save the property from being sold:—

*Held*, that on general principles of justice, equity and good conscience, the mortgagee is entitled to have the amount paid by him on account of revenue, added to the amount of the original lien.

*Nugender Chander Ghose v. Sreemutty Kaminee Dossee* (1) relied upon; *Kinn Ram Das v. Mozaffer Hosain Shaha* (2) distinguished.

*Held*, also, that the mortgagee is entitled to a personal decree against the mortgagor for the amount paid on account of cesses, regard being had to s. 70 of the Contract Act (IX of 1872).

*Smith v. Dinonath Mookerjee* (3) referred to.

APPEAL by the defendant, Upendra Chandra Mitter.

The plaintiff, Tara Prosanna Mukerjee, sued the defendant on two mortgage bonds. The first bond was dated the 17th April 1894, by which the defendant borrowed from the plaintiff Rs. 7,000, on the mortgage of his share in zemindaries lot *Palas-pai* and lot *Sarpara* and certain other properties. The second bond was dated the 10th February 1896, by which the defendant borrowed a further sum of Rs. 5,600, on the mortgage of the properties covered by the first mortgage and some other properties. The plaintiff alleged that, besides the aforesaid sums, he had to pay certain registration expenses and to pay into the Collectorate on different dates several amounts on account of the revenue and

\* Appeal from Original Decree No. 200 of 1899, against the decree of Kedar Nath Mozumdar, Subordinate Judge of Burdwan, dated Jan. 18, 1899.

(1) (1867) 11 Moo. I. A. 241; (2) (1887) I. L. R. 14 Calc. 809.  
 S. W. R. (P. C.) 17.

(3) (1885) I. L. R. 12 Calc. 213.

cesses due from the defendant for the estates mortgaged, aggregating in all to Rs. 1,877-6, these payments being made to save the said estates from being sold; and he submitted that, in the circumstances, he was entitled to add these sums to the amount of the original lien. The plaintiff accordingly prayed for a mortgage decree for the sum of Rs. 19,734-12-7½ gundas on the usual terms.

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The points urged in defence were, amongst other things, that the suit was not maintainable on account of misjoinder of different causes of action; that the plaintiff was guilty of bad faith and undue influence in respect of the alleged loan transactions; that the whole of the consideration money did not pass; and that as regards the alleged payments on account of revenue and cesses, assuming that the payments were made, they must be considered as voluntary, and the sums paid could not be made a charge on the mortgaged properties, specially as the plaintiff himself and the Maharaja of Burdwan were co-sharers of lot *Palaspai*, which the said Maharaja at any rate would have saved from sale.

The learned Subordinate Judge overruled the objections of the defendant and decreed the suit in full.

The appeal to the High Court, preferred by the defendant, was valued at Rs. 6,000 only.

*Babu Mahendra Kumar Mitra* (*Babu Surendra Chandra Bose* with him) for the appellant. My points are (i) the suit is not tenable owing to misjoinder of causes of action, the claim on mortgage being joined to claims of different descriptions; (ii) that a part of the consideration money for the second mortgage bond was not paid; (iii) that the plaintiff being a co-sharer of lot *Palaspai*, the sums paid by him as Government revenue are not recoverable as additions to the mortgage debt; and (iv) that at any rate the amount paid by the plaintiff on account of cesses is not recoverable as mortgage debt, as the liability to pay cesses is a personal liability.

[It being pointed out that the second point was not taken in the grounds of appeal, it was disallowed.]

As to the third point, as a co-sharer, the plaintiff is not entitled to the benefit of the last clause of sec. 9 of Act XI of 1859, as that section excludes co-sharers. The remedy of a co-sharer is

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to apply for exemption from sale under s. 18 of the Act: see *Jussoda Dossee v. Matunginee Dossee*(1). Whatever conflict there was, was set at rest by the Full Bench case of *Kinu Ram Das v. Mozaffer Hosain Shaha*(2). See also *Seth Chitor Mal v. Shib Lal*(3).

As to the fourth point, see *Shekaat Hosain v. Sasi Kar*(4). A mortgagee cannot be affected by a sale under the Cess Act: see sec. 99, last clause of Act IX of 1880 (B.C.).

*Dr. Rash Behary Ghose* (*Babu Nalini Ranjan Chatterjee* with him), for the respondent, referred to the remarks of Sir John Edge in *Seth Chitor Mal v. Shib Lal*(3), at pp. 280 and 287, and submitted that as that was a case of a co-owner who had no interest in the lands in suit, the remarks were *obiter dicta*. The dictum of the Privy Council in the case of *Nugender Chunder Ghose v. Sreemutty Kaminee Dossee*(5) was explained in the Full Bench case of *Kinu Ram Das v. Mozaffer Hosain Shaha*(2) to be limited to the case of a mortgagee, so that, apart from the provisions of sec. 9 of Act XI of 1859, a mortgagee was entitled to a lien for the sum advanced by him for payment of revenue, on general principles of justice, equity and good conscience. Reliance was also placed on the cases of *Imdad Hasan Khan v. Badri Prasad* (6), *Perianna Servaigaran v. Marudainayagam Pillai*(7), and *Leslie v. French*(8).

*Babu Mahendra Kumar Mitra*, in reply, submitted that in the case of *Imdad Hasan Khan v. Badri Prasad*(6), the mortgagee was in possession and could come in under s. 72 of the Transfer of Property Act. That was not so in the present case. The Madras case cited was also of a mortgagee in possession. If the Legislature had thought that there should be lien in any other case, it would have so declared in express terms: see Transfer of Property Act, s. 72. The Privy Council case of *Nugender Chunder Ghose v. Sreemutty Kaminee Dossee*(5) was under the old law, *i.e.*, Act I of 1845, which contained no provisions for creating a lien in favour of a mortgagee for Government

(1) (1869) 12 W. R. 249.

(5) (1867) 11 Moo. I. A. 241;

(2) (1887) I. L. R. 14 Calc. 809.

8 W. R. (P. C.) 17.

(3) (1892) I. L. R. 14 All. 273.

(6) (1898) I. L. R. 20 All. 431.

(4) (1892) I. L. R. 19 Calc. 783.

(7) (1899) I. L. R. 22 Mad. 332.

(8) (1883) L. R. 23 Ch. D. 552.

revenue paid. Since then there has been a legislative enactment, i.e., Act XI of 1859, which should be treated as exhaustive. The case of *Leslie v. French*(1) did not recognise the doctrine of salvage lien in general.

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**BAHARJEH AND PARCITER JJ.** In this appeal, which arises out of a suit brought by the plaintiff-respondent to recover a certain sum of money which is made up of loan advanced upon mortgage bonds, registration expenses and moneys paid on account of Government revenue and road and public works cesses due in respect of the mortgaged property, four points have been urged before us on behalf of the defendant-appellant—

- (i) That the suit was not maintainable by reason of misjoinder of causes of action ;
- (ii) That the payment of Rs. 500, which was disputed, had not been proved ;
- (iii) That the plaintiff being a part-proprietor of the estate, a share of which was mortgaged to him, was not entitled to the benefit of section 9 of Act XI of 1859 ; and
- (iv) That the amount paid on account of cesses could not be added to the mortgage debt and recovered by the sale of the mortgaged property.

As to the first point, it is sufficient to say that the amount at which the appeal is valued makes it incompetent to the appellant to raise it.

As to the second point, it not being raised in the memorandum of appeal, we did not think it fit to allow it to be urged, having regard to the clear finding on the point by the Court below.

The third point is not altogether free from doubt.

It is contended by the learned vakil for the appellant that as section 9 of Act XI of 1859 excludes the case of a proprietor of a share of an estate in arrear when providing for the receipt of money as a deposit in the early part of the section, the concluding portion of the section which provides for a mortgagee making a deposit under the section acquiring a lien on the share of the

(1) (1883) L. R. 23 Ch. D. 552.

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estate protected must be held to be inapplicable to the case of a mortgagee who is also a part-proprietor; and as the plaintiff is admittedly a part-proprietor of the estate, he is not entitled to any lien under the section. We are of opinion that this contention is so far correct that section 9 does not entitle the plaintiff to claim a lien on the mortgaged property for sums paid by him on account of Government revenue. But it has been argued by the learned vakil for the plaintiff-respondent that though section 9 of Act XI of 1859 may not give a mortgagee, who is also a part-proprietor, the benefit of the lien spoken of in the concluding part of the section, it does not disentitle him to any such lien if on general principles of justice, equity and good conscience he is entitled to it. So far, we think, this contention on behalf of the respondent is correct. Section 9 of Act XI of 1859 evidently does not negative it. Is the mortgagee who is also a part-proprietor entitled, according to the general principles of justice, equity and good conscience, to the benefit of any such lien, or does the fact of his being a part-proprietor of the estate disentitle him to the benefit of the lien which he would otherwise have been entitled to as a mortgagee? We are of opinion that this question should be answered in favour of the plaintiff-respondent. For the contention of the plaintiff that he is entitled to such a lien finds support in the following dictum of their Lordships of the Privy Council in the case of *Nugender Chunder Ghose v. Sreemutty Kaminee Dossee* (1), where their Lordships say:—

“Considering that the payment of the revenue by the mortgagee will prevent the talook from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person who had such an interest in the talook as entitled him to pay the revenue due to the Government, and did actually pay it, was thereby entitled to a charge on the talook as against all persons interested therein for the amount of the money so paid.”

It is argued for the appellant that this dictum of their Lordships, which was laid down in a case decided with reference to Act I of 1845, which was the sale law then in force, must be taken to be modified in its operation by reason of the Legislature

(1) (1867) 11 Moo. I. A. 241; 8 W. R. (P. C.) 17.



having subsequently changed the law and made an express provision in section 9 of the present Sale Law Act, XI of 1859.

We are unable to accept this argument as correct. If section 9 of Act XI of 1859 applies to the case, the plaintiff has the lien he claims under that section. If it does not apply to the case, it cannot be said that the Legislature has made an express provision for the case, which makes the general principles laid down in the dictum quoted above inapplicable to it. The only way in which the change in the law as made by section 9 of Act XI of 1859 could be said to be operative in restricting or qualifying the principle laid down in the dictum of the Privy Council quoted above would be by saying that section 9 of the Sale Law by excluding the case of a part-proprietor from its operation intends to deprive a mortgagee, who is also a part-proprietor, of the lien which he would otherwise have had. But, as we have said above, this effect cannot be attributed to section 9. That being so, we think the dictum quoted above is an authority for the view we take. It has been said that that dictum has been interpreted by a Full Bench of this Court in the case of *Kinu Ram Das v. Mozaffer Hosain Shaha*(1) to be inapplicable to the case of a part-proprietor. That, no doubt, is so; and if the lien in this case had been claimed by the plaintiff only as a part-proprietor of the estate protected, the decision of the majority of the Full Bench in the case of *Kinu Ram Das v. Mozaffer Hosain Shaha*(1) would have been a complete answer to such a claim. But as it is, the plaintiff claims the lien not as a part-proprietor, but as a mortgagee; and the judgment of the majority of the learned Judges in the case of *Kinu Ram Das v. Mozaffer Hosain Shaha*(1) leaves the case of a mortgagee claiming a lien untouched. That being so the case does not stand in the way of the plaintiff's claim succeeding. We may add that according to the English law also, the case of a mortgagee claiming the benefit of the lien for payments made by him to protect the mortgaged property has been considered to stand upon an exceptional footing: see the case of *Leslie v. French*(2). And the view we take is in accordance with that taken by the Madras High Court in the case of *Perianna Servai-garan v. Marudainayagam Pillai*(3).

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(1) (1887) I. L. R. 14 Calc. 809.

(2) (1883) L. R. 23 Ch. D. 552.

(3) (1899) I. L. R. 22 Mad. 332.

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It is argued that the Transfer of Property Act, section 72, by declaring that a mortgagee in possession can charge the mortgaged property for payments made by him on account of Government revenue raises an implication that a mortgagee not in possession has no such right. We do not see that that follows. We do not think that there is anything in the Transfer of Property Act which militates against the view we take. For the foregoing reasons we are of opinion that the contention raised upon the third point on behalf of the appellant must fail.

As to the fourth point, no doubt the plaintiff is not entitled to claim any lien on account of payments made for road and public works cesses. Such payments were made, not to protect any interest of the plaintiff which might otherwise have been imperilled, a sale for road and public cesses not passing more than the right, title and interest of the judgment-debtor. But though that is so and though the amounts paid on account of cesses must therefore be excluded from the mortgage decree, the plaintiff is entitled to a personal decree against the mortgagor for such amounts, regard being had to the provisions of section 70 of the Contract Act. The view we take is in accordance with that taken by this Court in the case of *Smith v. Dinonath Mookerjee* (1).

No doubt the inclusion of this claim in a suit upon a mortgage bond does involve a misjoinder of causes of action, but, as we have already said, it is not open to the appellant to raise this objection. It is a defect which is cured by section 578 of the Code of Civil Procedure, and the Court below having made a decree for the amount, we shall allow the decree to stand subject to the modification indicated above, namely, that the decree shall be a personal one and not form any part of the mortgage decree granted to the plaintiff.

The result then is that, subject to the modification indicated above, the decree of the Court below will be affirmed and this appeal dismissed with costs.

*Appeal dismissed.*

M. N. R.

(1) (1895) I. L. R. 12 Calc. 213.

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v.

## TITURAM MUKERJEE.\*

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June 12.

*Compensation—Apportionment of compensation money—Landlord and Tenant—Land Acquisition Acts (I of 1894 and XVIII of 1885)—Rent fixed in perpetuity—Bengal Tenancy Act (VIII of 1885) s. 50, sub-s. (2).*

In apportioning compensation money, awarded under the Land Acquisition Act, between the landlord and the tenure-holder, the Court ought to proceed on the principle of ascertaining what the value of the interest of the landlord is on the one hand, and that of the tenant on the other, and to divide the sum awarded between them in accordance with these values. Where the rent is fixed in perpetuity the landlord is not entitled to more than the capitalized value of his rent.

*Gordon Stuart and Co. v. Maharajah Mohatab Chunder Bahadoor*(1), *Raye Kissory Dassees v. Nilcant Day*(2), *Godadhar Dass v. Dhunput Sing*(3), *Dunne v. Nobo Krishna Mookerjee* (4), *Rajah Khetter Kristo Mitter v. Kumar Dinendra Narain Roy*(5), and *Shama Prosunno Bose Mozumdar v. Brakoda Sundari Dasi*(6) considered.

APPEAL by claimant No. 1, Kumar Dinendra Narain Roy.

This appeal arose out of a land acquisition case in which compensation to the amount of Rs. 20,057 odd was awarded by Government for a plot of land acquired in the suburbs of Calcutta for the purpose of constructing a public street. The land acquired consisted of three holdings, Nos. 119, 119A and 119B, within the Government estate, Panchannagram.

The first claimant, Kumar Dinendra Narain Roy, was the superior tenant under Government. The second claimant was a tenant under the first, and claimed to possess a permanent, heritable and transferable tenure at a fixed rental. The third claimant held under a lease from the second claimant; the lease was

\* Appeal from Original Decree No. 309 of 1900, against the decree of F. E. Pargiter, District Judge of 24-Perganas, dated Aug. 21, 1900.

(1) (1863) 1 Marsh. 490.

(4) (1839) I. L. R. 17 Calc. 144.

(2) (1873) 20 W. R. 370.

(5) (1897) 3 C. W. N. 202.

(3) (1881) I. L. R. 7 Calc. 585.

(6) (1900) I. L. R. 28 Calc. 143.

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given to one Aprokash Mookerjee and others, and they conveyed their rights to the Roller Mills Co., who built a large flour mill on the aforesaid holdings, but the plot of land acquired had not been built upon. The land acquired was partly *busti* and partly tank, and was occupied by some temporary tenants.

The first claimant denied the permanent right as claimed by the second claimant, and asserted that the latter was only a tenant-at-will.

The Court below found that the second claimant was a permanent tenure-holder, and that his rent was fixed. It held that the value of the landlord's (claimant No. 1) interest was the capitalized value of the quit-rent which he received in respect of the land acquired, and apportioned the compensation money according to that principle amongst the claimants. Against this decision the landlord, Kumar Dinendra Narain Roy, appealed to the High Court.

*The Offg. Advocate-General (Mr. L. P. Pugh), (Dr. Ashutosh Mookerjee, Babu Hari Charan Sarkhel and Babu Beraj Mohan Mazumdar with him) for the appellant.* I submit that the Judge in the Court below has proceeded on an entirely erroneous principle. He finds on the facts that the second claimant has a permanent interest, and that the rent of the latter is not enhancible. Assuming that the findings are correct, I say that it is not correct to describe the landlord as a mere rent-receiver. It may often be that the rent of a tenure is not enhancible; but will it be right to say that the landlord has no right whatsoever, in the case of compulsory acquisition of lands forming the tenure, save and except to receive compensation calculated at so many years' purchase of the rent received by him? The true principle would be to ascertain the value of the interest of each holder of a tenure and give him a sum equivalent to the purchase money of such interest: see the cases of *Sreenath Mookerjee v. Maharajah Mahatap Chand Bahadoor*(1) and *Gordon Stuart and Co. v. Maharajah Mohatab Chunder Bahadoor*(2). Here the lands are in the suburbs of Calcutta, where the value is, of course, a great deal higher than that in the Moffasil. The case

(1) (1860) 16 S. D. A. 326.

(2) (1863) 1 Marsh. 490.

of *Rajah Khetter Kristo Mitter v. Kumar Dinendra Narain Roy*(1) does not stand in my way, for I am quite willing to accept compensation calculated on the principle stated therein. Can it be said that the learned Judge has assessed compensation payable to the zemindar on the principle stated in that case? I submit not. The case of *Raye Kissory Dassee v. Nilcant Day*(2) has not been approved of in the later cases: see the cases of *Godadhar Dass v. Dhunput Sing*(3), *A. M. Dunne v. Nobo Krishna Mookerjee*(4) and *Shama Prosunno Bose Mozumdar v. Brakoda Sundari Dasi*(5).

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*Dr. Ashutosh Mookerjee* (following the Advocate-General) contended that the presumptions under section 50 of the Bengal Tenancy Act apply only to the proceedings under that Act, and not to proceedings under the Land Acquisition Act, or any other Act.

*Mr. O'Kinealy* (*Babu Hara Kumar Mitter* with him) for the tenant, claimant No. 2. I submit on the findings of the Court below, which have not been challenged in the present appeal, no case has been made out for the interference of this Court. The question resolves into this: What are the rights of the zemindar? Has he any right beyond that of a receiver of rents? Beyond the right to receive a particular sum of money as rent, what does he lose by reason of the acquisition of his land? Applying, therefore, the test laid down in the case of *Shama Prosunno Bose Mozumdar v. Brakoda Sundari Dasi*(5), we can easily get at the money-value of the landlord's interest. The case of *Godadhar Dass v. Dhunput Sing*(3), on which reliance has been placed by the other side, is distinguishable from the present case. There the zemindar was not a party, and that considerably alters the aspect of the case. Beyond the right to receive a certain rent, there are no special circumstances in this case, such as the chance of an enhancement of rent, upon which any money value can be put. The zemindar is, therefore, not entitled to receive anything more than what the Court below has given him.

(1) (1897) 3 C. W. N. 202.

(3) (1881) I. L. R. 7 Calc. 585.

(2) (1873) 20 W. R. 370.

(4) (1839) I. L. R. 17 Calc. 144.

(5) (1900) I. L. R. 28 Calc. 146.

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*Babu Umakali Mookerjee (Babu Debendra Nath Ghose, Babu Satis Chunder Ghose and Babu Charoo Chunder Ghose with him) for the third claimant, supported Mr. O'Kinealy's arguments.*

*The Offg. Advocate-General in reply.*

**MACLEHAN C.J.** The question which arises upon this appeal is as to the apportionment of the compensation money awarded for the acquisition of certain lands under the Land Acquisition Act as between the zemindar on the one hand and the respondents to this appeal on the other, who claim to be the owners of a permanent tenure, heritable and transferable, and with a rental fixed in perpetuity in the land in question. The question debated before us is as to the principle upon which the apportionment ought to be made.

The case was gone into very fully before the District Judge of the 24-Perganas who, in an extremely careful judgment, has dealt with the whole matter and with a variety of questions which have not been raised before us upon appeal.

Two questions only have been argued before us: (1) whether the Court below was right as to the principle upon which it apportioned the compensation money between the zemindar and the tenure-holders, and (2) whether the rental can be properly regarded as fixed in perpetuity. It will be convenient to deal with the latter point first.

I am in accord with the argument of the appellant that sub-section (2) of section 50 of the Bengal Tenancy Act does not apply to the present case: it only applies to a suit or proceeding under that particular statute. But that does not dispose of the matter. In my opinion, upon the evidence adduced in the case for the present respondents, there was sufficient ground to justify the Court in presuming that the rate of rent had not been changed from the time of the permanent settlement. Without going in detail into that evidence, which is summed up by the learned District Judge in paragraph 35 of his judgment, I think, having regard to the documents in the case and to the fact that the same rental which is mentioned in the deed of 1799 has been paid without alteration for a period of nearly one hundred years, the Court would be justified in drawing the inference that the same rent existed at the date of the permanent settlement, and that the

rate of rent had not since been changed. We may take it then for the purpose of the present decision that the rental was one fixed in perpetuity.

I now come to the main question discussed on the appeal. The learned Judge has held that the zemindar is only entitled to such a capitalized sum as represents some twenty years' purchase of the rent which he was receiving under the lease,—a very small sum, some Rs. 3-8-1, which rent so capitalized,—the number of years' purchase has not been contested,—gives a capital sum of Rs. 70-1-8. Add the statutory allowance to it, and we get a total of Rs. 80-9-11. In point of fact, for the reasons given in paragraph 52 of the judgment, the landlord has been given a much larger sum, *viz.*, Rs. 273-13-9. But he is not satisfied: he contends that he is entitled to more than the mere capitalized value of his rent; that he is entitled to something for the chances of the lease coming to an end or being forfeited. This contention has not been disregarded by the Court below; for in paragraph 41 of the judgment, it deals with the suggestion. So far as I understand, no evidence was adduced to show what would be the monetary value of any such chance, and it would, I think, be extremely difficult to appreciate it. If the rent were enhancible, he would be entitled to something for that chance of enhancement; but that again would be difficult to estimate by a money value. But in addition to all this the landlord claims not only the capitalized value of his rent, but, after the tenure-holder has been compensated for any loss he may have sustained, to have the balance of the compensation money divided equally between himself and his tenant, and he contends that the proposition is supported by ample authority of this Court. I will deal with the cases in a moment. It seems to me all important with a view to apportioning the compensation money between the zemindar on the one hand and the tenure-holder on the other, to ascertain what the real interest of each party is in the property, and what is the interest each party parts with. In the present case, if the lease be permanent and at a fixed rent, as we must take it to be, what are the respective interests of the zemindar and of the tenure-holder? Subject to those chances to which I have referred, and which are scarcely appreciable by a money payment, the

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interest of the landlord cannot be put higher than the fixed rent he receives ; for which, as he loses it, he is entitled to be compensated at so many years' purchase. The real beneficial owner in the case before us is the tenure-holder, and not the landlord ; the property is virtually his, subject to the payment of the small rent I have mentioned.

I will now deal with the various authorities. Our attention has not been directed to any case dealing with this subject in the other High Courts in India, nor am I personally aware of any which throws any light on the matter.

In the case of *Gordon Stuart and Co. v. Maharajah Mohatab Chunder Bahadoor*(1), it was held that : " where lands are taken compulsorily, the principle upon which the amount of compensation is divisible amongst the zeminder and the holder of several subordinate tenures is by ascertaining the value of the interest of each holder of a tenure, and to give him a sum equivalent to the purchase money of such interest." There is nothing in that decision to support the suggestion that the compensation money ought to be divided between the zemindar and the tenant, as is the present contention of the appellants.

The next case is that of *Roye Kissory Dassie v. Nilcant Day* (2), where it was held that " where land held in *putni* is taken by Government for public purposes, the proper mode of settling the rights of the parties interested is to give the putnidar an abatement of his rent in proportion to the quantity of the land which has been taken from him, and to compensate the zemindar for the loss of rent which he sustains. Accordingly the compensation awarded was held to have been very fairly distributed, where the zemindar received a little more than sixteen years' purchase of the rent abated and the *putnidar* received the remainder." I see no suggestion there of dividing the compensation money between the landlord and the tenant. Chief Justice Couch was a party to that decision, and he says :—

"The compensation ought to be apportioned between the parties according to the value of the interest which each of them parts with. The zemindar has a right to the fixed rent, and the loss he sustains is of so much of his rent. Any other possible

(1) (1868) 1 Marsh. 490.

(2) (1873) 20 W. R. 370.



injury, such as the chance of the *putnidar* throwing up the land and its being diminished in value by what has been taken by Government and still remaining, as it did, liable to pay the same revenue is, we think, not appreciable, and cannot be taken into account. If there is no abatement of the rent, and the *putnidar* continues liable to pay to the zemindar the same rent as he had to pay before, there would be nothing for which the zemindar ought to receive compensation. He would be in the same position as before, except with reference, as we have said, to the possibility of a loss which is scarcely appreciable. But the proper mode of settling the rights of the parties is to give to the *putnidar* an abatement of his rent in proportion to the quantity of land which has been taken from him. It is not fair that he should be liable to pay the same rent when a part of the land has been taken away. The decision of the Judge that the plaintiff is entitled to an abatement of the rent is correct, and is in accordance with the principle laid down in the case of *Maharajah of Burdwan*(1). This being so, the zemindar ought to be compensated for the loss of rent which he sustains, and the money ought to be divided between the parties accordingly. The *putnidar's* getting an abatement of his rent is to be taken into account as partly the way in which he is compensated for the loss of the land."

The next case is one which, I think, has created the difficulty—a decision of Chief Justice Garth and Mr. Justice McDonell in *Godadhar Dass v. Dhunput Sing*(2). That case is treated by the appellant as an authority for the proposition that as between the zemindar and the *putnidar* the former is entitled to as much of the compensation money as the latter; and the head note of that case certainly supports that view, as also certain observations of the learned Chief Justice, which tend directly in the same direction. But it can scarcely be regarded as an authority as the zemindar was not a party to the case, and the contest was between the *putnidar* and the *dar-putnidar*. It cannot be put higher than an *obiter dictum*. The language upon which so much reliance is placed is at page 589, where the learned Chief Justice says:—

"As regards the zemindar, it is a mistake to suppose that his interest in the land is confined entirely to the rent which he

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(1) (1860) S. D. A. 328.

(2) (1881) I. L. R. 7 Calc. 585.

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receives from the *putnidar*. He is the owner of it under the Government; and in the event of the *putni* coming to an end by sale, forfeiture or otherwise, the property would revert to the zemindar, who might deal with it as he pleased in its improved state; and although in some cases, and possibly in this, the chances of the *putni* coming to an end may be more or less remote, there is no doubt that in all cases the zemindar is entitled to some compensation (small though it be) for the loss of his rights. At any rate he would generally be entitled to receive at least as much as the *putnidar* to whom, in this instance, the whole compensation has been awarded."

It is upon the latter sentence that so much stress is laid by the present appellant. If the chances to which the learned Judge refers are susceptible of a money appreciation, they ought to be taken into account, but in the present case no evidence was apparently forthcoming on the point.

I now pass on to the case of *A. M. Dunne v. Nobo Krishna Mukerjee*(1). There the question is not discussed in the judgment. The Court only held that the money should be apportioned as was done in an unreported case (appeal from Original Decree No. 311 of 1886), which is referred to in the note at page 147 of the report, which again seems to have followed another case, where the decree was made by consent. Neither the case before Sir Richard Garth or that before Sir Comer Petheram can, under the circumstances, be regarded as conclusive decision on the point.

The next case was that of *Rajah Khethro Kristo Mitter v. Kumar Dinendra Narain Roy* (2) decided in May 1897, where the Court said: "It occurred to me during the course of the argument, that the proper course would have been to ascertain, *first*, what was the value of the landlord's interest, and, *secondly*, what was the value of the tenant's interest, and having found the money value of these two interests, to apportion and divide the money accordingly. But I understand that in this country it is almost impossible to take that course; it is almost impossible to say what is the value of the interest, that is, the precise money value of the lessee's interest on the one hand, and on the other what is the precise money value of the landlord's interest. That being

(1) (1889) 1 L. R. 17 Calc. 144.

(2) (1897) 3 C. W. N. 203.

so the Courts have adopted what perhaps I may call a rough-and-ready way of settling the matter,"—and the Court, though apparently with some misgiving, followed the case of *Dunne v. Nobo Krishna Mukerjee*(1), that which I have just commented upon.

The matter was again discussed in the case of *Shama Prosunno Bose Mazumdar v. Brakoda Sundari Dasi*(2) and there the Court, after referring to the case I have last cited, said:—

"The principle upon which the compensation money in cases of this class ought to be apportioned as between the landlord and tenant is as follows:—First, the Court must ascertain the amount of rent payable to the landlord and capitalize that rent at so many years' purchase, the number of years' purchase depending upon the particular circumstances of each particular case. The landlord is at the outset entitled to that capitalized value, but I think he is entitled to something more. There is, or in many cases may be, the chance of an enhancement of the then existing rent; he is entitled in my opinion to have the value of this chance of enhancement assessed, and to have a money-value put upon it and to take that money-value out of the compensation awarded. It may in some, perhaps in many, cases be somewhat difficult to arrive at the true capitalized value to the landlord of this chance of enhancement, but it will be for the landlord who sets up such a claim to make it out, and show what the true value is. I do not think the landlord can be entitled to anything more, nor have I heard it suggested that he can be."

In the present case we regard the rent as fixed in perpetuity, and no question of the chance of enhancement arises. The case (3) before Chief Justice Couch was apparently not cited in the case(2) I have just mentioned; but it seems that the view there taken by the Court is in conformity with that held by that learned Judge in the case I have quoted from. Upon this review of the authorities I do not think that the appellant has substantiated that as between the zemindar and the tenure-holder, after providing for the capitalized value of the rent due to the zemindar, the compensation money ought to be divided between himself and the tenant. I cannot see upon what principle such a result

(1) (1889) I. L. R. 17 Calc. 144.

(2) (1900) I. L. R. 28 Calc. 146.

(3) (1878) 20 W. R. 370.

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can properly be arrived at. I think the Court ought to proceed on the principle of ascertaining what is the value of the interest of the zemindar on the one hand with which he has parted, and that of the tenant on the other, and to apportion the compensation money between them in accordance with those values. In my opinion the decision of the Court below upon this point was right, and the appeal must be dismissed with costs—two separate sets, one to each respondent.

As regards the suggestion made by Mr. O'Kinealy that the lower Court was wrong in making no order as to costs, I do not think we can interfere, as that has not been made the subject of any cross-objection.

GRIFFITH J. I concur.

Appeal dismissed.

S. C. G.

PRIVY COUNCIL.

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v.

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P. C.*
1903March 2^d,
May 6.

[On appeal from the High Court at Fort William in Bengal.]

Resumption—Rent, suit for—Co-owner not joined as party—Land resumed by Government and resettled with heirs of former proprietor—Assessment with separate rent after resumption—Bengal Act VIII of 1879, s. 10—Suit for rent as fixed at settlement.

A chuck forming part of a permanent *ganti* tenure, of which a pottah was granted in 1867 by the zemindar to the defendant at an annual rent of Rs. 2,800, was resumed by the Government, and in 1884 granted on a temporary settlement to the heirs of the zemindar, who was then dead, the rent being fixed at Rs. 860 a year. One of the heirs sold his share in the chuck to the plaintiff, and his share in the *ganti* tenure to another purchaser; but the defendant continued to pay the whole of the rent under the pottah of 1867 as before. That pottah contained a clause for the proportionate abatement if any part of the land was resumed. In a suit by the plaintiff suing alone for the rent of the chuck at the rate fixed in the settlement of 1884, the defendant denied his liability or any engagement to pay rent to the plaintiff. The High Court held that the suit was not maintainable on the ground that the purchaser of the share of the *ganti* tenure from the heir who parted with it had not been joined as a party:—

Held, that the resumption by Government did not disturb the possession either of the zemindar's heirs or of the defendant, and the rights of the latter were not abrogated by the settlement of 1884 so long as the zemindar or his heirs were in a position to let him have the land. The claim of the defendant for freedom from liability to the plaintiff in no way conflicted with s. 10 of Bengal Act VIII of 1879, which was plainly intended to fix for the future the liability of such under-tenants as might enter into possession, and under the circumstances did not interfere with the contractual rights of the subordinate holder. It was because the liability of the defendant was not under the settlement, but for a lump sum under the contract of 1867, that all the owners of the land for which the lump sum was the rent, were necessary parties in any action for the rent of the chuck in suit. Had the settlement created a liability against the defendant to pay Rs. 860 as rent to the plaintiff, the latter would not have required the concurrence of the owner of another and different chuck to enable him to maintain the suit.

APPEAL from a decree (9th February 1900) of the High Court at Calcutta reversing a decree (1st February 1898) of

* *Present*: LORD DAVEY, LORD ROBERTSON, SIR ANDREW SCOBLE AND SIR ARTHUR WILSON.

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the Officiating District Judge of Jessore, by which a decree (16th September 1897) of the Subordinate Judge of Khulna dismissing the appellant's suit, was reversed with costs.

Plaintiff No. 3, Pria Nath Das, appealed to His Majesty in Council.

The suit was brought on 13th April 1897 by Pria Nath Das and two other plaintiffs against the respondent, Ramtaran Chatterjee, as principal defendant, and one Hemoda Kant Roy as *pro forma* defendant to recover the rent of a property known as chuck Khatali, and the only question in this appeal was whether the appellant was entitled under the circumstances of the case to sue for and recover his proportion of the rent.

Raja Baroda Kant Roy was the proprietor of an estate (262) of the Jessore Collectorate (now 186 of the Khulna Collectorate), and on 27th November 1867 he executed in favour of the defendant, Ramtaran Chatterjee, a *ganti* lease (an hereditary under-tenure at a fixed rent), of a portion of his estate called mouzah Pankhali, which, together with other chucks, included chuck Khatali, the consideration paid for it by Ramtaran Chatterjee being a bonus of Rs. 7,500 and an annual rent of Rs. 2,300. At the time of the creation of this *ganti* tenure it was in contemplation of the parties that there was a possibility of a portion of the lands included within the *ganti* being taken out of the estate by reason of resumption proceedings by Government, and accordingly there was a clause in the lease providing for abatement of rent should that contingency occur. That clause is set out in their Lordships' judgment.

In 1882 the Government resumed some of the land included in the *ganti* tenure, the result being that a portion of the lands, including chuck Khatali, was with other land formed into a new estate, which was numbered 989 and assessed with a rent of Rs. 850. At the time of such resumption Raja Baroda Kant Roy being dead, his sons and heirs, Gyanoda Kant Roy, Manoda Kant Roy, and Hemoda Kant Roy, the *pro forma* defendant, obtained from the Government a temporary settlement of the new estate at the above rental (Rs. 850). The settlement was made in 1884 for 20 years.

Hemoda Kant Roy sold his share in the original estate (186) to one Kali Prosanna Ghose in 1892, and he also sold his share in the new estate on 12th January 1896 to Pria Nath Das, who retained possession of the lands in his original *ganti* tenure which (as has been said) fell within the new estate, and Gyanoda Kant Roy and Manoda Kant Roy, the two sons of Raja Baroda Kant Roy, who had retained their shares, continued to receive their share of the rent in respect of the old *ganti* tenure as a whole down to the last of the years for which rent was claimed in this suit, which was brought by Rani Bhubanmohini, the widow of Gyanoda Kant Roy, Rani Probbabati, the widow of Manoda Kant Roy, and Pria Nath Das to recover Rs. 4,500 as the rent of Khatali (estate 989) for the years 1300 to 1303 B.S. (1893 to 1896) at the rate of Rs. 850 a year.

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When the settlement was made by the Government in 1884, the principal defendant, Ramtaran Chatterjee, as *gantidar* was served by the Collector of Khulna, by whom a jammabundi was made of chuck Khatali, with the usual notices, and in reply to the jammabundi he addressed the following letter to the Deputy Collector of the Sunderbuns dated 5th April 1886, to which the annexed reply of 11th April 1886 was sent:—

“TO THE DEPUTY COLLECTOR OF SUNDERBUNS.

SIR,

I HAVE the honour to state that I received a notice from your Honourable Court, dated 11th of May 1886, informing me that you have been pleased to make settlement with me of the resumed portion of my mokurruri mowrussi *gantidar* jamma abad Khatalia and to settle the rents due from me on that account. But since then I have not paid off any portion of my dues to the Government; and as it is not fair for me to withhold payment for any further length of time, I take the liberty to ask you whether I shall remit the rents due from me of the years 1291 and 1292 B. S., at Rs. 627-5-11 per year, direct to the Collector of Khulna through the zemindar, Raja Baroda Kant Rai Bahadoor, under whom I held the jamma as a mokurruri mowrussi *gasti*, as I find the Raja's people also claiming the said sum from me.

I have the honour to be,

66, COLLEGE STREET, CALCUTTA.

SIR,

The 5th April 1886.

Your most obedient servant,

RAMTARAN CHATTERJEE,

“Mokurruri mowrussi *gantidar* of chuck
Khatalia in the abad Penkhali.”

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A COPY of notice be sent to the petitioner, directing him to pay rent to the Raja Bahadoor.

The 11th April 1886.

D. N. B.

J. N. MOITRA."

The plaintiffs claimed rent at the rate sued for on the basis of the Government jumma-bundi and the letter of the defendant dated 5th April 1886.

Ramtaran Chatterjee filed a written statement, in which he denied the right of the plaintiffs to maintain the suit, and stated that he did not hold any jami-jamma at a rent of Rs. 850, appertaining to chuck Khatali, subordinate to the plaintiffs, and did not bind himself by any engagement to pay rent regarding such jami-jamma either to the plaintiffs or their predecessors, and that he was not bound to pay rent as above to the plaintiffs. He also asserted that the suit was defective by reason of the non-joinder of Kali Prosanna Ghose as a party, and stated that he (the defendant) had obtained a *ganti* lease from Raja Baroda Kant, which in 1884 had been resumed and resettled by the Government, but that he had, notwithstanding such resumption and re-settlement, continued to pay the rent for the land to the sons of the Raja, and had never paid any separate rent for chuck Khatali, although in the assessment for such settlement the rent of Khatali was stated to be Rs. 850; and that as Kali Prosanna Ghose had purchased a one-third share of the lands comprised in his *ganti* lease other than chuck Khatali, which had been sold to Pria Nath Das, the said Pria Nath Das was not entitled to sue for only a portion of the rent of the land held under the said lease.

The Subordinate Judge held that it had neither been alleged nor proved that the defendant Ramtaran Chatterjee had ever, in fact, paid rent for chuck Khatali, as forming a distinct and separate tenure; that the lady plaintiffs had recovered each their one-third share of the rent of chuck Khatali together with the rent of the rest of the holding under the lease of 1867; that chuck Khatali was never separated from the *ganti* lease, being unaffected by the resumption and re-settlement proceedings; and that Ramtaran Chatterjee had never expressly or impliedly agreed to pay rent separately for chuck Khatali, his letter

to the Collector of 5th April not amounting to any such agreement.

The Subordinate Judge therefore dismissed the suit. The District Judge on appeal by Pria Nath Das held that the suit was one for rent as fixed by the settlement proceedings in respect of the land which fell within the new estate created by Government after the resumption proceedings, and that there was no question of the amount of rent being other than that which was fixed by the settlement proceedings, the only question between the parties being whether Ramtaran Chatterjee's holding in the new estate was a new holding or a part of the old holding. As to this he held that it was a new holding independent of the old one, and therefore the defendant was liable for the rent of the lands in the new estate independently of the rent payable in respect of the old *ganti* holding which he could seek to have proportionately reduced. As the lady plaintiffs had admitted receipt of their shares of the rent, he dismissed the suit so far as they were concerned, but gave Pria Nath Das a decree for his one-third share of the rent of chuck Khatali.

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From that decision Ramtaran Chatterjee appealed to the High Court, and the appeal was heard by a Division Bench of that Court (BANERJEE and STEVENS JJ). The material part of their judgment was as follows :—

It is contended on the defendant's behalf—

First, that regard being had to the terms of the lease by which the defendant's *ganti* tenure was created and to the events that have followed as found by the Courts below, the Lower Appellate Court was wrong in holding that the defendant is "liable for the rent of the lands in the new estate independently of the rent payable in respect of the original *ganti*"; and

Secondly, that even if the defendant was liable for the rent of the lands in the new estate independently of the rent payable in respect of the original *ganti*, the Lower Appellate Court was wrong in giving the plaintiff No. 3, Pria Nath Das, a decree for his one-third share of the rent of these lands in this suit, when it was not a suit for apportionment or adjustment of rent, and when Kali Prosanna Ghose, one of the co-owners of the old estate in which the *ganti* tenure is partly situated, has not been made a party to it.

If the second contention prevails, it would be unnecessary and undesirable to express any opinion on the first. We shall, therefore, consider the second point before dealing with the first.

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Now this is how the facts as admitted or as found by the Lower Appellate Court stand. The defendant's *gasti* tenure was created by Raja Baroda Kant Roy, proprietor of estate No. 262 of Jessore (now No. 186 of Khulna) in 1867, in respect of certain lands then supposed to be included wholly in that estate. In 1882 Government instituted resumption proceedings, and a portion of the lands included within the *gasti* tenure was resumed as being outside estate No. 186, and was, along with certain other lands, formed into a new estate No. 989, and Gyanoda Kant Roy, Manoda Kant Roy, and Hemoda Kant Roy, sons and heirs of Raja Baroda Kant Roy, obtained a temporary settlement of the new estate, the lands of that estate included in the *gasti* being assessed at Rs 850 odd. Hemoda Kant Roy sold his share in the old estate to Kali Prosanna Ghose in 1299 (1892) and his share in the new estate to Pria Nath Das, the plaintiff No. 3, in 1302 (1896). But Gyanoda Kant Roy and Manoda Kant Roy, and after them their successors, the plaintiffs Nos. 1 and 2, continued to receive their share of the rent from the defendant in respect of the old *gasti* as a whole, down to the last of the three years for which rent is claimed in this suit.

In this state of facts, and in the absence of any finding or allegation that Hemoda Kant Roy, the vendor of the plaintiff Pria Nath Das and of Kali Prosanna Ghose or his vendees, ever received rent separately in respect of the portions of the *gasti* lands that fell within the old and the new estate, it is difficult to see how Pria Nath Das can in this suit recover any portion of the rent, especially when he has not made Kali Prosanna Ghose a party to it.

No finding arrived at in this suit as to the rights of the parties and as to the mode in which the rent should be apportioned or adjusted can be binding on Kali Prosanna Ghose. And if that is so, it would be obviously unfair to the defendant to pass a decree for rent against him upon the basis of any adjustment of the rent which it may be open to Kali Prosanna Ghose to upset. The view we take is in accordance with that taken by this Court in *Bindu Bashini Dasi v. Peari Motun Boss* (1). The second contention of the appellant must, therefore, prevail. That being so, it is, as we have said, unnecessary and undesirable for us to express any opinion with reference to the first point raised.

The High Court, therefore, allowed the appeal and restored the decree of the Subordinate Judge.

On this appeal,

March 26.

De Gruyther for the appellant contended that the resumption and settlement proceedings in 1884 had the effect of bringing to an end Ramtaran Chatterjee's holding in the old estate so far as Khatali was concerned, and of creating a new holding in a new estate for which he was bound to pay the rent assessed on it in the settlement proceedings. Reference was made to Bengal Act VIII of 1879, s. 7, clauses (b) and (c) and

(1) (1891) I. L. R. 20 Calc. 107.

s. 10*. He suffered no loss by this, for under the pottah of 1867 he was entitled to take advantage of the clause providing for the case of Khatali passing into other hands, and could claim an abatement of rent on his lands in the old estate. Though chuck Khatali was in one sense in the possession of the same persons, it was practically and legally in different hands: the change of possession contemplated by the clause for abatement had occurred. And it was held on a different tenure: instead of being a permanent estate as the old one was, the estate was, since the resumption by Government, held on a settlement for 20 years only. The District Judge was, therefore, correct in his decision that Ramtaran Chatterjee's holding in the new estate was a new holding quite independent of the old *ganti* tenure. It was also contended that Ramtaran Chatterjee had by his letter of

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* Bengal Act VIII of 1879 (an Act to limit and define the powers of Settlement Officers).

Section 7.—The rent recorded as demandable from an under-tenant shall be determined by the following rules:—

(a) Whenever the Settlement Officer shall find any person holding as an under-tenant, he shall first ascertain and record whether the tenure so held is binding as against the Government.

(b) If the Settlement Officer finds the tenure to be so binding, the rent recorded as demandable from such under-tenant shall in no case be higher than an amount which shall be 10 per cent. below the aggregate of the rents recorded as payable to him from the subordinate under-tenants and raiyats whose holdings fall within his tenure.

(c) If the Settlement Officer shall find that the tenure is not binding as against the Government, he shall first determine the proportionate amount of the demand of land revenue to be assessed upon the lands included in the tenure in accordance with any orders of Government for the time being in force regulating the demand of land revenue, and shall record the rent payable by such under-tenant at such a sum (not being less than such proportionate amount of land revenue or more than the aggregate of the rents recorded as payable to him from the subordinate under-tenants and raiyats whose holdings fall within his tenure) as may seem fair and equitable with reference to the character or circumstances of the tenure.

Section 10.—Every under-tenant and raiyat shall be liable to pay the rent recorded as demandable from him under this Act unless it shall be proved in any suit instituted by such under-tenant or raiyat to contest his liability to pay the same that such rent has not been assessed in accordance with the provisions of this Act.

But nothing in clause (c) of section 7 of this Act or in this section shall be held to limit the discretion of the Court in determining in any suit under this section the rent of an under-tenant of the class described in the said clause (c).

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5th April 1886 expressly or impliedly agreed to pay rent separately for chuck Khatali at the rate claimed of Rs. 850. The appellant was, therefore, it was submitted, entitled in this suit to recover his proportionate share of the rent due in respect of chuck Khatali, and the High Court was in error in holding that he could not do so as Kali Prosanna Ghose had not been made a party to it.

C. W. Arathoon for the respondent, Ramtaran Chatterjee, was not called upon.

Cur. adv. vult.

The judgment of their Lordships was delivered by
LORD ROBERTSON. This appeal arises out of a suit for rent of a property known as chuck Khatali. The proceedings have an appearance of complexity which does not belong to the facts.

In 1867 Raja Baroda Kant Roy, from whom the appellant's title is derived, executed a pottah, creating, in favour of the respondent Chatterjee, an estate of permanent *ganti* tenure in mouzah Pankhali, which included along with other chucks the chuck Khatali, now in dispute.

A bonus of Rs. 7,500 was paid for this grant; and the annual rent to be paid for the whole of the lands was Rs. 2,300. It was known at the time of the pottah that the Government had a right to resume, and was likely to resume, some part of the lands, and the following clause is part of the pottah :—

"If there be any law suit with Government or with any person regarding (torn) the proprietary right of any other part of the land, and if any (torn) steps are necessary to be taken, then such steps shall be taken by me. God forbid, if I lose the said suit and if the land of that suit go to the possession of another person (torn), then the rent of the said land at the rate prevailing in the mehal for the jami-jamma thereof shall be deducted from the aforesaid jamma of Rs. 2,300. Proper (torn) should be taken by me whenever any dispute shall arise regarding proprietary right. Except the above, on no other account abatement or enhancement shall be made regarding the aforesaid mowrassi mokurrari jamma of Rs. 2,300, and neither I nor my heirs shall be competent to enhance the rent of—hupred (torn, indistinct) and neither you nor your heirs shall be competent (torn) to claim abatement of the aforesaid fixed jamma at any time."

In 1882 the Government did in fact resume, *inter alia*, the chuck Khatali. The Government did not, however, take khas

possession of Khatali, but granted it in temporary settlement to the heirs of Raja Baroda Kant Roy, he being now dead. The period of settlement was 20 years from 1884—1904, being “the year fixed for the expiry of settlements in the Presidency Division;” and the rent fixed for chuck Khatali was Rs. 850.

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The theory of the plaint, which was filed on 13th April 1897, is that the effect of these settlement proceedings was that the respondent Chatterjee became liable to the owner of Khatali for the rent fixed in the settlement. Accordingly, the plaint ignores entirely the pottah of 1867, and rests the liability of Chatterjee on the settlement alone; and the present appellant maintains his right to sue alone (he being purchaser of Khatali only), without the action being sued by the owners of the other lands which formed parts of the *ganti* tenure of 1867 and for which the lump annual sum of Rs. 2,300 was the rent.

(It is true that originally there was a plurality of plaintiffs, the two widows, who are now formal respondents and into whose position it is unnecessary to enter, having been plaintiffs, but Kali Prosanna Ghose, who is now owner of part of the land granted in 1867, was never a plaintiff.)

To the plaint thus laid the respondent Chatterjee opposed, as his substantial defence, his *ganti* right of 1867, as constituting his title to the chuck Khatali; and, with reference to the demand for Rs. 850, he said in his written statement:—

“The present defendant does not hold any *jami-jamma* at a rent Rs. 850-2-4, appertaining to chuck Khatali, subordinate to the plaintiffs, and he (defendant) did not bind himself by any engagement to pay rent regarding such *jami-jamma* either to the plaintiffs or to their predecessors, and he (defendant) is not bound to pay rent as above to the plaintiffs.”

The Subordinate Judge of Khulna, before whom the action came, dismissed the suit with costs on 16th September 1897. On appeal the Court of the District Judge of Jessore varied the decree of the Subordinate Judge, and on further appeal to the High Court, that Court reversed the Lower Appellate Court and restored the decree of the first Court.

In their Lordships' judgment the defence of the respondent Chatterjee was well founded. The settlement proceedings of 1884 cannot be held to have abrogated the rights of that respondent under the pottah, so long as the Raja Baroda Kant Roy and his

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heirs were themselves in a position to let him have the lands. In fact, the resumption by Government did not disturb the possession either of the Raja's heirs or of Chatterjee. The mere fact of resumption cannot be held to have brought to an end the rights of the respondent Chatterjee under the pottah, for the pottah itself recognises the precarious nature of the grantor's title, and provides against the loss of possession should that be the result.

The appellant founded mainly on the 10th section of the Bengal Act VIII of 1879. The claim of the respondent Chatterjee in no way conflicts with the operation of this section or with the rights of the Government under it. The section is plainly intended to fix for the future the liability of such under-tenants as may enter into possession.

If it had seemed good to the Government to take the land into their own khas possession, or to settle it on strangers to the contract with the respondent Chatterjee, then the recorded rent would have been the rate of payment by that respondent. But the lands having been settled on the heirs of the Raja who granted the pottah, the Act does not interfere with the contractual rights of the subordinate holder. Now the period of the settlement being still current, the *ganti* right still subsists, and the respondent is only liable for the rent payable under the pottah.

The appellant endeavoured to make out that the respondent Chatterjee had by his letter of 11th April 1886 (1) made himself liable for the rent of Rs. 850; but their Lordships agree with the Courts below in considering that document to be wholly insufficient to lead to this result.

The High Court have rested their judgment on the somewhat narrow ground that Kali Prosanna Ghose not being a party to the suit, the appellant could not obtain the decree sought. It appears to their Lordships that this really implies the broader ground upon which they proceed. If the theory of the suit were right, and the settlement of 1884 created liability against the respondent Chatterjee for Rs. 850 of rent to the owner of the chuck Khatali, then the appellant would not require the concurrence of the owner of another and different chuck.

(1) The letter was dated 5th April and the reply the 11th April. J. V. W.

It is because the liability of the respondent Chatterjee is not under the settlement, but for a lump sum under the contract of 1867, that all in right of the lands, for which the lump sum is the rent, are necessary parties in any action for rent for chuck Khatali.

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Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed. The appellant must pay the costs of the respondent Chatterjee.

*Appeal dismissed.*

Solicitors for the appellant: *Watkins and Lempriere.*

Solicitors for the respondent: *T. L. Wilson & Co.*

J. V. W.

## CRIMINAL APPEAL.

BIRENDRA LAL BHADURI

*v.*

EMPEROR.\*

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*Charges, misjoinder of—Defective charge—Appeal—Trial by jury—Forgery—Using as genuine forged document—Cheating—Criminal Procedure Code (Act V of 1908), s. 423—Penal Code (Act XLV of 1860) ss. 467,  $\frac{467}{109}$ , 468,  $\frac{468}{109}$ , 471 and  $\frac{477}{511}$ ,—Indian Registration Act (Act III of 1877) s. 82.*

It was alleged by the prosecution that the accused had forged the registration endorsement and stamp on the back of a *kabala* by which he had sold certain lands to *D*, and that he had produced before a Sub-Registrar a forged mortgage-deed, whereby he purported to mortgage to *D* the identical lands sold under the *kabala*; it was also alleged that the accused had produced the said mortgage-deed before the Secretary of a Loan Office, in order to induce that office to grant him a loan. The accused was tried in one trial on charges under ss. 467,  $\frac{467}{109}$  and 468,  $\frac{468}{109}$  of the Penal Code with regard to the alleged forgery of the *kabala*; under s. 82 of the Registration Act, and ss. 467,  $\frac{467}{109}$  and s. 471 of the Penal Code with regard to the mortgage-deed, and also on charges under ss. 471, and  $\frac{477}{511}$  of the Penal Code with reference to the attempt to cheat the Loan Office. The accused was convicted under ss.  $\frac{467}{109}$ ,  $\frac{477}{511}$  and s. 471 of the Penal Code:—

*Held*, on appeal,

(i) That as the alleged forgery of the *kabala* and the presentation of the forged mortgage-deed to the Secretary of the Loan Office could not be said to be parts of the same transaction, there had been a misjoinder of charges;

(ii) That the charge to the jury was defective, inasmuch as it did not show what the facts of the case were, what the evidence adduced was, or what was the case for the accused;

(iii) That inasmuch as the evidence on the record showed that there was a case which ought to be investigated by a jury, the accused should be retried.

APPEAL by Birendra Lal Bhaduri.

In this case the appellant agreed to sell to one Drobomayi Debi, the mother of one Peari Mohan Rai, certain lands at Jessore, and it was also agreed that the purchaser should grant to the vendor a *putni* lease of the said lands. In pursuance of this agreement on the 28th January 1902 the appellant executed a

\* Criminal Appeal No. 130 of 1903, against the order of J. Phillimore, District and Sessions Judge of Jessore, dated Dec. 20, 1902.



*kabala* or deed of sale, and certain sums of money were paid to him, and a considerable sum was paid in respect of a charge which existed on the lands in favour of the Jessore Loan Office. The *kabala* was made over to Hemanta Lal Ghose, a servant of the vendor, by Prosanna Chunder Rai, the manager of Peari Mohan Rai, for registration; a month later Hemanta Lal Ghose brought back the *kabala* which bore on its back what purported to be a registration stamp and an endorsement by the Sub-Registrar of Godkhali to the effect that it had been registered on the 18th February 1902.

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On the 1st February 1902, the appellant produced before the Sub-Registrar of Godkhali a mortgage-deed by which he purported to mortgage to the said Drobomayi Debi the identical property which he had sold to her under the *kabala*. The mortgage was registered on the 18th February, and an endorsement was subsequently placed on it to the effect that the mortgage-money was paid off; this endorsement purported to be signed by the son of the mortgagee.

On the 3rd April the appellant applied to the Jessore Loan Office for a loan, and on the 4th April produced before the Secretary of that office the said mortgage-deed in order to show that the incumbrance had been discharged, and to induce the office to grant a loan. The matter, however, was not carried through, and no money was advanced.

It was alleged by the prosecution that the *kabala* had never been registered, and that the endorsement on it was a forgery; it was also alleged that the mortgage-deed was a forgery, and that in fact no mortgage transaction had ever taken place.

The appellant was tried before the Sessions Judge of Jessore and a jury in one trial, on charges under ss. 467,  $\frac{467}{109}$  and 468,  $\frac{468}{109}$  of the Penal Code with regard to the alleged forgery of the *kabala*; under s. 82 of the Registration Act, and s. 467,  $\frac{467}{109}$  and s. 471 of the Code with regard to the mortgage-deed; and under ss. 471 and  $\frac{417}{511}$  of the Code with reference to the attempt to cheat the Loan Office.

The Sessions Judge charged the jury as follows:—

“Seven separate charges have been framed against the accused Birendra Lal Bhaduri. It will be your duty to bring in a verdict of guilty or not guilty upon

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each of these charges separately. It is my duty to explain the law to you; it is your duty to decide facts.

Of the seven charges, two relate to the alleged forgery of the endorsement of registration on the back of the *kabala*. They were under sections 467 alternately with <sup>467</sup>/<sub>100</sub> and <sup>468</sup>/<sub>100</sub> alternately with 468 of the Penal Code. Three charges relate to the mortgage bond. They were under section 82 of the Registration Act, 467 with <sup>467</sup>/<sub>100</sub> and 471 of the Penal Code. The other two charges relate to an attempt which the accused is said to have made in April to borrow money from the Jessore Loan Office; they are under sections 471 and <sup>417</sup>/<sub>81</sub> of the Penal Code. The charges under sections 467 and 468 have been added to alternative charges of <sup>467</sup>/<sub>100</sub> and <sup>468</sup>/<sub>100</sub> because there is no direct evidence as to who forged the documents.

(Section 415 read to Jury). That is the definition of cheating. If you find that the accused, by making the endorsement of registration on the *kabala*, intended to deceive Prosanna Babu into thinking that the *kabala* had been registered, and so to induce Prosanna Babu not to get that *kabala* registered then his intention was to cheat, provided he acted dishonestly (sections 463 and 464 of the Indian Penal Code read to jury). To constitute forgery, there must be these elements—(1) a document signed, (2) the signature must be made with the intention of causing it to be believed that it was signed or executed by a person by whom it was not signed or executed, and (3) the signature must have been made with intent to defraud. Unless there has been dishonesty, there is no forgery. (Sections 23 and 24 of the Penal Code read to jury.) As regards the *kabala*, the Sub-Registrar has denied that he made the endorsement. He has produced the stamps and seals of his office. You should notice that in the endorsement of presentation for registration on the *kabala*, the words “day of” have been written in the impression of the stamp they appear printed.

Then the article of the Stamp Act Schedule under which the *kabala* is said to have been stamped is 40 (b) over an erased 15, and you have heard the arguments based on this. If the endorsement was not made by the Sub-Registrar, who made it? On this there is no direct evidence. However there is Prosanna Babu's evidence that the accused left Peari Mohan's office with Hemanta Lal Ghose, when he took the document for registration. Is it possible, if that was the case, that the endorsement could have been forged, unless the accused himself had made the endorsement or have conspired with Hemanta Lal to get it made; who, except the accused, had any motive to make it? If you find that the accused made the endorsement, you will have to consider if he acted dishonestly. If the accused had executed the *kabala* and had received the purchase-money, and if Prosanna Babu was entitled to get the document registered, then you should find that the accused's intention was to defraud, if his intention was to lead Prosanna Babu to take no steps to get the document registered. For registration would have extended the legal rights of a purchaser by enabling him to sue on the *kabala*.

If you find (1) that the *kabala* was not registered at Godkhali, (2) that the *kabala* has been executed by the accused, and that the accused had received the purchase-money, (3) that the evidence proves beyond all reasonable doubt that the accused either made the endorsement of registration on the *kabala* himself or engaged in a

conspiracy with Hemanta Lal Ghose for making it, and (4) that the accused's intention was to dishonestly prevent the *kabala* being registered by causing Prosanna Babu to believe that the *kabala* had been registered, then it is your duty to bring in a verdict of guilty against the accused under alternative charges 467 and <sup>468</sup>/<sub>100</sub> of the Penal Code.

If you find him guilty under those sections, you should also find him guilty under sections 468 and <sup>468</sup>/<sub>100</sub> in the alternative, if his intention was to cheat. If you do not find all those four facts proved, you should find the accused not guilty under those sections.

As regards the mortgage bond, you have the evidence of Prosanna Chunder Rai, Ram Chunder Bose, Surendra Nath Mozumdar, and PEARI MOHAN ROY. Ram Chunder and Surendra deny having witnessed the signature of the document. If you find that (1) the accused executed the *kabala* on 28th January and received the purchase-money; (2) that he did not execute the mortgage-bond on 1st February in the presence of witnesses; (3) but that it was made subsequently without any negotiations with Drobomayi; (4) that it was made with the intention of causing it to be believed that the accused had not sold the property to Drobomayi, and with the intention of defrauding her of the property that she had purchased, then you should find that the mortgage-bond has been forged. If you find the document to be a forged one, you should find the accused guilty under sections 467 and <sup>467</sup>/<sub>100</sub> of the Penal Code, in the alternative. If you find it proved beyond all reasonable doubt that the accused either made the forged document himself or entered into a conspiracy with Hemanta Lal Ghose for making it, you should find him guilty under section 471 of the Penal Code, if you find that he presented it for registration, knowing that it was a forged document with intent to cause wrongful loss to Drobomayi. As regard s. 82 of the Registration Act (read to jury), the Sub-Registrar says the accused told him that he had executed the document.

'Executed' is defined thus as completed—execution of deeds is the signing, sealing, and delivering of them in presence of witnesses (Ameer Ali's Evidence Act, page 509). If the accused did before the Sub-Registrar state that he had executed the document, you are to consider whether he thereby made a false statement intentionally; if so, you should find the accused guilty under section 82 of the Registration Act.

As regards what took place at the Jessore Loan Office (illustration to section 415 of the Indian Penal Code read to jury), you should find accused guilty of attempting to cheat, if you find that he tried to raise money from the Jessore Loan office in April by mortgaging a property which had been previously sold by him without disclosing the fact of the sale. If he fraudulently also showed to the Secretary the mortgage-bond on that date, if the mortgage-bond was a forged one, and he knew it to be so, he is also guilty of a second offence punishable under section 471 of the Penal Code.

If you find the evidence clearly establishes the guilt of the accused, you should find him guilty; but if you have any doubts about the accused's guilt, you will find him not guilty.

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As regards his written statement (jury say they remember it, and do not wish it read through again), if the case is a false one got up on account of a dispute about commission payable to Peari Mohan's amla, how is it that one of the amla of Peari Mohan has been accused? How is it that Surendra, who says he has been dismissed from Peari Mohan's office, comes forward to support a false case got up by Peari Mohan's amla?"

The jury acquitted the appellant of the charges relating to the forgery of the *kabala*, but convicted him under s.  $\frac{487}{109}$  of the Penal Code of forging the mortgage-bond, and also under s.  $\frac{417}{41}$  of attempting to cheat the Loan Office, and under s. 471 of dishonestly using the mortgage-bond as genuine before the Sub-Registrar and the Secretary of the Loan Office with the knowledge that it was forged, but they acquitted him of the charge under s. 82 of the Registration Act.

*Mr. Jackson* (*Babu Dasarathi Sanyal* and *Babu Gobinda Chandra Roy* with him) for the appellant. The charge to the jury is no charge at all; it is impossible to gather from it what the case is about. The Judge nowhere points out any evidence which relates to any fact. There is an utter want of direction and there is also misdirection. The jury have found the appellant guilty of dishonestly using the mortgage-bond before the Sub-Registrar and at the same time have found him not guilty of the charge under s. 82 of the Registration Act of making a false statement to the Sub-Registrar when he presented the bond for registration. The two findings are utterly inconsistent and shows that the jury did not understand the case. If the appellant used the bond dishonestly before the Sub-Registrar, he must have made a false statement. There is also a misjoinder of charges. The offences charged are complete and do not relate to one another, nor can it be said that they form one transaction. On the 1st February the appellant is alleged to have conspired to forge the mortgage-bond, and to have fraudulently used it as genuine before the Sub-Registrar on the 18th February. On the 27th February the appellant is alleged to have forged an endorsement on a different document, the *kabala*. Then he is alleged to have made a false statement to the Sub-Registrar on the 18th February; and lastly to have attempted on the 3rd April to cheat the Jessore Loan Company. The transaction with the Loan

Company was with a different set of people, and in no way related to any of the previous transactions. In trials by jury if there is misdirection, the High Court may go into the facts to ascertain whether in its opinion there should be a retrial, and if it so finds, it must send the case back for retrial by jury and cannot try the case itself: *Queen-Empress v. Chatradhari Goala*(1), *Ali Fakir v. Queen-Empress*(2), *Biru Mandal v. Queen-Empress*(3), *Elahee Buksh*(4), *Wafadar Khan v. Queen-Empress*(5).

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The Deputy Legal Remembrancer (Mr. Douglas White) for the Crown. The learned Judge has not laid the facts of the case before the jury at all. I am not prepared to say that there is no misdirection. With regard to misjoinder, the forging of the endorsement on the *kabala* and the forging of the mortgage bond formed part of the same transaction, the object being to deny the genuineness of the *kabala* and cheat Drobomayi Debi, then the forging of the mortgage-bond and its presentation to the Loan Office would also be one transaction, the question for your Lordships to decide is whether these offences are so related to one another in point of purpose as to constitute one continuous action; if your Lordships so decide, then these offences would be taken as to form parts of the same transaction: *Emperor v. Sherufalli Allibhoy*(6). The question remains as to whether your Lordships will order a new trial. There is a great deal of evidence which the other side has not been able to dispose of and which ought to go to a jury. Your Lordships have power to go into the facts in order to ascertain whether there is evidence which ought to be placed before a jury: *Jamiruddi Masalli v. Emperor*(7), *Wafadar Khan v. Queen-Empress*(5), and the decision of the Privy Council in *Subrahmanya Ayyar v. King-Emperor*(8).

Mr. Jackson in reply. In an appeal from a jury trial your Lordships have no power to try the case, as that would be usurping the powers of the jury. Your Lordships are only empowered to go

(1) (1897) 2 C. W. N. 49.

(2) (1897) I. L. R. 25 Calc. 230.

(3) (1897) I. L. R. 25 Calc. 561.

(4) (1866) 5 W. R. Cr. 80.

(5) (1894) I. L. R. 21 Calc. 955.

(6) (1902) I. L. R. 27 Bom. 135.

(7) (1902) I. L. R. 29 Calc. 782.

(8) (1901) I. L. R. 25 Mad. 61.

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into the facts for the purpose of ascertaining whether there should be a new trial, that is to say whether there is sufficient evidence to show that the accused is guilty, and that he ought to be retried. *Elahee Buksh*(1), *Jamiruddi Masalli v. Emperor*(2).

**HARINGTON AND BRETT, JJ.** In this case Birendra Lal Bhaduri was tried before the learned Sessions Judge of Jessore, and a jury on 7 charges. Two of the charges were framed under sections 467, § 487 and 468, § 487 and relate to the alleged forgery of a certain *ka'ala*. Three of the charges relate to a registered mortgage bond, and are framed, one under section 82 of the Registration Act, one under 467, § 487 of the Indian Penal Code, one under 471 of the Indian Penal Code. The remaining two charges relate to an alleged attempt to cheat the Jessore Loan Office, and are framed under section 471 and § 487 of the Indian Penal Code. The jury acquitted the appellant of the charges relating to the forgery of the *ka'ala*, but convicted him under section § 487 of forging the mortgage-bond, and also under § 487 of attempting to cheat the loan office, and under section 471 for dishonestly using the mortgage-bond as genuine before the Sub-Registrar and the Secretary of the Loan Office with the knowledge that it was forged. But nevertheless, they acquitted him of the charge under section 82 of the Registration Act. On behalf of the appellant it is argued that (i) the trial as held was bad for misjoinder of charges, (ii) that the summing up was defective.

Inasmuch as we think that the latter contention is well founded, as we are of opinion that after hearing counsel on both sides, and after perusing the record that the case is one which ought to be retried, we shall not deal with the facts, except in so far as it is necessary so to do for the purpose of dealing with the question of misjoinder.

The allegation made by the prosecution is that an agreement was made between the appellant Birendra on one hand and Drobomayi Debi on the other for the sale by the former to the latter of certain property, and that it was a term of agreement that the purchaser should grant to the vendor a *putni* lease of the

(1) (1866) 5. W. R. Cr. 80.

(2) (1902) I. L. R. 29 Calc. 782.

lands comprised in the agreement for sale. It is stated that on 28th January 1902 the appellant executed a *kabala* in pursuance of this agreement, and that certain sums of money were paid to him, and a considerable sum was paid in respect of a charge which existed on the property in favour of the Jessore Loan Office. The *kabala* was taken away by Hemanta Lal Ghose, a servant of the vendors, for registration; it was brought back about a month later by the same man, and it then bore on its back what purported to be a registration stamp, and an endorsement to the effect that it was registered on 18th February.

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It is alleged that this endorsement is a forgery, and that the *kabala* has never been in fact registered. It is in reference to this forgery that the first two charges were framed.

It is next alleged that on 1st February the appellant produced before the Sub-Registrar of Godkhali a mortgage-deed by which he purported to mortgage to Drobomayi Debi (the purchaser under the *kabala*) the identical land which had been sold under the *kabala* for the same sum for which the land had been sold under the *kabala*. This mortgage was actually registered on the 18th February, and at some period subsequent to the 18th February an endorsement was placed on it to the effect that the mortgage money was paid off, and this purported to be signed by Peari Lal, the son of the mortgagee.

It is alleged that this bond is a forgery, and that in fact no mortgage transaction ever took place. In respect to this transaction three charges have been framed, one under the Registration Act and the others under ss. 467, 467½ and 471, 471½; on the 3rd April it is said that the appellant applied to the Jessore Loan Office for a loan, and on the 4th April produced before the Secretary of that office the mortgage-deed in question in order to show that the incumbrance was discharged, and to induce the office to grant a loan. For some reason or other the business did not go through, and the money was not advanced. It was in respect of his dealings with the mortgage-deed that the last two charges were framed.

In our opinion the objection that there has been a misjoinder must hold good. We cannot see how it can be said that the alleged forgery of the *kabala* and the presentation of the forged

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mortgage-bond to the Secretary of the Loan Office can be stated to be parts of the same transaction.

On the facts stated for the prosecution it was open, we think, to the Crown to contend that the forgery of the endorsement on the *kabala* and the forging of the mortgage-deed formed part of one transaction of which the object was to enable the appellant to deny the genuineness of the *kabala*, with a good chance of success, should that question come into controversy in a law Court in any suit against him for his rent under the *putni*, or it might be contended that the forging of the mortgage-deed and the presentation of the forged deed to the Loan Office was one transaction in which the object was to cheat the Loan Office. But these transactions are distinct, and we do not think charges relating to the two different transactions can be lawfully joined in one trial.

The whole of the evidence has been placed before us and various reasons have been urged on which it is argued that we ought to accept the case set up by the defence. The charge to the jury does not shew what the facts were, what the evidence adduced was, or what the case of the defendant was. The case was not put to the jury as required by law or in such a way as to enable them to exercise their functions as jury men.

We have abstained from discussing the evidence, and we must not be understood to express any opinion on the facts of the case. On the ground that there has been a misjoinder of charges, and that the charge to the jury is defective, we set aside the conviction and sentence; but inasmuch as we are of opinion that on the evidence as it appears on the record there is a case which ought to be investigated by a jury, we direct that the appellant be retried according to law.

D. S.



## APPELLATE CIVIL.

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April 1, 2;  
June 11.

*Lease—Renewal of lease—Offer by lessor to renew lease without stating terms, effect of—Arbitration—Award—Valuation—Civil Procedure Code (Act XIV of 1882), s. 525.*

In an agreement to lease there was a proviso to the following effect:—"At the expiration of the period of the lease, in the event of a new lease not being given, the said lessor shall be at liberty to resume direct possession of the land demised, and to take over all the buildings then standing thereon at a valuation arrived at by three arbitrators":—

*Held*, that the mere offer on the part of the lessor to grant a new lease without any terms being mentioned could not operate as the giving of such lease within the meaning of the document.

*Held*, further, that if there was no matter in difference between the parties which could be referred to arbitration, the valuation made by three persons appointed by the plaintiff was not an award within the meaning of s. 525 of the Civil Procedure Code, and it could not therefore be filed in Court.

*Collins v. Collins*(1), *Leeds v. Burrows*(2) referred to; *In re Carns-Wilson and Greene*(3), *Chooney Money Dasse v. Ram Kinkar Dutt*(4) followed.

APPEAL by E. R. Macnaghten, the plaintiff.

A certain plot of land had been leased to the plaintiff by the predecessor in interest of the defendant, Maharaja Rameshwar Singh of Darbhanga, for fifteen years from the 1st November 1884 to the 31st October 1899. The lease provided that the plaintiff might erect buildings on the land, and that in the event of a fresh lease not being granted at the expiration of the term, the lessor would be at liberty to resume direct possession of the land demised, and to take over all the buildings then existing thereon, at a valuation arrived at by three arbitrators, one of whom was

\* Appeal from Original Decree No. 443 of 1900 against the decree of Hara Gobind Mookerjee, Subordinate Judge of Mozaffarpur, dated June 25, 1900.

(1) (1858) 26 Beav. 306.

(3) (1886) L. R. 18 Q. B. D. 7.

(2) (1810) 12 East. 1.

(4) (1900) I. L. R. 28 Calc. 155.

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to be appointed by the lessor, another by the lessee, and the third by the two so appointed. By a further proviso in the lease it was stipulated that in the event of either party neglecting to appoint an arbitrator, the other party would be competent, after giving a month's notice in writing, to appoint all three arbitrators, and the decision of such arbitrators would be final against all the parties.

The plaintiff alleged that there was no renewal of the lease, and that by a letter dated the 27th March 1899, he opened a correspondence with the defendant for the purpose of taking the necessary steps for valuing the houses and buildings on the land, but received no ready response. The plaintiff continued the correspondence with the defendant, but the defendant avoided, as far as possible, the nature and substance of the correspondence.

On the 27th November 1899, the plaintiff gave the defendant notice as required under the terms of the lease, and upon the defendant still neglecting to appoint a duly authorised arbitrator, the plaintiff, on the 4th January 1900, appointed as arbitrators L. M. T. Deveria, H. W. Williams and E. F. Watson. The arbitrators then gave notice to the defendant on the 4th January 1900, and made their award on the 11th January 1900.

The plaintiff then applied before the Subordinate Judge of Mozaffarpur to have the award filed in Court.

On the 25th June 1900 the Subordinate Judge delivered his judgment, holding that the defendant was, under the terms of the lease, not bound to make any offer of renewal, and the provisions with reference to the assessment of the value of the buildings and the payment of the same by him, were not to come into effect, if he failed to do so; that the value of the buildings was to be assessed in the way mentioned in the lease, and the defendant was to take them over on payment of such value, only in the event of his not granting a fresh lease on fair and reasonable terms. But no such refusal on the part of the defendant was proved; that the reference to arbitration was not in accordance with the terms of the lease and was premature, and he therefore refused to file the alleged award and dismissed the application.

*Dr. Ashutosh Mukerjee (Babu Monmatha Nath Mitter and Babu Provas Charan Mitter with him) for the appellants. By a*

proviso in the lease it was stipulated that if the respondent did not renew the lease the appellant could take over possession of the land together with the buildings on it, having them valued by three arbitrators. No renewal was made, and the appellant then took over possession and appointed three arbitrators to value the buildings. An award was made by them, and an application was presented to the Court to have the award filed. The Subordinate Judge refused to file the award, on the ground that the reference to arbitration was not in accordance with the terms of the lease and was premature. There is nothing to show what were the terms of the lease. My contention is that as there was no renewal of the lease, it was open to the appellant to appoint arbitrators, and I submit the application to file the award ought never to have been refused.

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*The Advocate-General (Mr. J. T. Woodroffe), Dr. Rash Behary Ghose and Babu Ram Charan Mitter* for the respondent. Other questions are involved in this case than those stated by the other side. This is not a matter that comes within s. 525 of the Civil Procedure Code, but is merely a matter of valuation of certain buildings. It is not an arbitration matter at all: see Russell on Awards, (8th Edition) pages 37 and 159. These persons proceeded on nothing else but the valuation, and were not arbitrators in any sense: *Chooney Money Dasse v. Ram Kinkur Dutt* (1). An award must be such that a decree can be passed upon it: see s. 522 of the Civil Procedure Code. Here there is nothing which you can enforce at all. If it cannot be determined to whom the amount is to be paid, then s. 522 of the Code cannot be enforced.

The mode of proceedings under the arbitration sections is very stringent. There must be a reference by the parties of the question in dispute. Here the questions in dispute between the parties were manifold. An arbitrator, if he does not take evidence, is no arbitrator. In this case the arbitrators heard no evidence at all.

The whole power of the arbitrators was determined upon the terms of the lease; they were mere valuers, and the order made by them cannot be taken to be an award: I submit the judgment of

(1) (1900) I. L. R. 28 Calc. 155, 156.

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the Court below should be upheld. The following cases were referred to during the course of the argument: *Mahomed Wahid-uddin v. Hakiman*(1), *Bindessuri Pershad Singh v. Jankee Pershad Singh*(2), *Ghulam Khan v. Muhammad Hassan*(3), *Johnston v. Cheape*(4) and *Drew v. Leburn*(5); Russell on Awards, page 80.

*Babu Provas Charan Mitter* in reply.

**GHOSE AND PRATT, JJ.** This appeal arises out of an application made under section 525 of the Code of Civil Procedure praying that an award, made by certain persons described as arbitrators, be filed in Court. The Court below has dismissed the application, and hence this appeal by the plaintiff.

The facts of the case are briefly these: One Mr. Stevens, the predecessor in title of the defendant, the Maharajah of Durbhanga, executed a lease in favour of the plaintiff on the 1st of December 1884, in respect of a plot of 10 bighas and odd cottahs of land, for 15 years, the lease expiring on the 31st October 1899, it being stipulated, among other matters, as follows: "The said lessee shall be entitled and shall have full right during the period of the lease to build upon the land demised any one or more building or buildings of masonry work or otherwise or to plant trees, &c., in the whole or any portion thereof according to the option of the said lessee, and to use the same or to let the same on hire for his own profit just as the said lessee might consider just and proper. At the expiration of the period of the lease in the event of a new lease not being given, the said lessor shall be at liberty to resume direct possession of the land demised and to take over all the buildings then standing thereon at a valuation arrived at by three arbitrators, one of whom is to be appointed by the lessor, the second by the lessee, and the third by the first two arbitrators so appointed as before. In case either party neglect to appoint an arbitrator, the other party can, after one month's notice in writing, appoint all three arbitrators, and the party neglecting to appoint shall have no right to raise any objection to the arbitrators so appointed as aforesaid. The decision

(1) (1898) I. L. R. 25 Calc. 757.

(3) (1901) I. L. R. 29 Calc. 167.

(2) (1889) I. L. R. 16 Calc. 482.

(4) (1817) 5 Dow. 247.

(5) (1885) 2 Mcq. H. L. 1.

of the arbitrators as to the matter of valuation shall be accepted as final by both the parties."

The plaintiff subsequently erected a building upon the land in question, and in the year 1899, before the term of the lease actually expired, there was considerable correspondence between the parties as to whether the lease of the land in question should be renewed, and also as to the appointment of arbitrators for the purpose of valuing the building.

The plaintiff's case is that there was no renewal of the lease; that the defendant did not appoint an arbitrator such as was contemplated by the terms of the lease of the 1st December 1884, and that he had therefore to appoint all the three arbitrators, and that the said arbitrators on the 11th January 1900 made an award determining the sum of Rs. 29,986-12-6, as the value of the house and the out-buildings, and as payable to the plaintiff by the defendant. And it is this award which the plaintiff sought to be filed in the Court below. The defendant, however, pleaded that he having offered to renew the lease of the land to the plaintiff, the latter was not entitled to demand the nomination of an arbitrator for the valuation of the building standing thereupon; that though at one time he, the defendant, nominated an arbitrator, it was simply to meet any difficulty that might be raised with reference to the construction of the terms of the lease of the 1st December 1884; that the award, which was sought to be filed, was invalid, illegal and void; and that the arbitrators appointed by the plaintiff had no authority to make an award in the matter.

The Subordinate Judge has held that the defendant by his letter of the 29th July 1899 had expressed his willingness to grant a fresh lease of the land to the plaintiff on the expiration of the term of the lease of the 1st December 1884, and that, therefore, it could not be said that the lessor did not give to the lessee a new lease as contemplated by the terms of the lease of the 1st December 1884; and hence the contingency under which the matter of the valuation of the building might be referred to arbitration did not properly arise; and, indeed, the reference to arbitration was premature. That officer at the same time, however, is of opinion that the arbitrator appointed by the defendant was not a duly authorised

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or an independent and impartial arbitrator, and that the defendant having neglected to appoint such an arbitrator, the plaintiff was entitled to appoint all the three arbitrators, and that such appointment would have been good if the reference to arbitration had not been premature. He has also expressed the opinion that there was no misconduct on the part of the arbitrators appointed by the plaintiff, and there was nothing to vitiate the award made by them. In the result, however, the Subordinate Judge being of opinion that the reference to arbitration was premature and not in accordance with the conditions of the lease, the award could not be filed in Court, and he has accordingly dismissed the suit.

It will be observed that though the defendant, by his letter of the 29th July 1899, expressed his willingness to grant to the plaintiff a fresh lease of the land, neither the rate of rent, nor the period for which the defendant was prepared to grant such fresh lease, was mentioned; and the plaintiff by his letter of the 31st July 1899, which was in reply to that of the 29th July, distinctly indicated that he was not prepared to take a renewal of the lease of the land in question, and insisted upon the matter of the valuation of the buildings standing thereupon being referred to arbitration. And though, later on, the plaintiff expressed his willingness to take the land and the house standing thereupon at a monthly rent, nothing came out of it; and, indeed, the subsequent correspondence between the parties was directed to the appointment of arbitrators for the purpose of valuing the buildings. It is quite clear, therefore, that the parties were not agreed as to the renewal of the lease of the land; and the question here arises whether the parties having not come to an agreement as to the grant of a fresh lease, and the defendant having simply offered to grant such a lease, there was such a compliance on the defendant's part with the conditions of the lease of the 1st December 1884 as precludes the plaintiff from insisting upon the matter of the valuation of the buildings being referred to arbitration. The particular passage in the lease which bears upon this question is as follows: "At the expiration of the period of the lease in the event of a new lease not being given, the said lessor shall be at liberty to resume direct possession

of the land demised and to take over all the buildings then standing thereon at a valuation arrived at by three arbitrators, &c., &c." The Subordinate Judge in holding, as he does, that the offer on the part of the defendant to renew the lease was a sufficient compliance with the terms of the lease just referred to, refers to an earlier passage in the same document, which has already been quoted, wherein the word "give" occurs. And the Subordinate Judge argues that the word "give" therein used was not meant in the sense of give and take, and that therefore the expression, "a new lease not being given," as used in the second part of the document, could only have a reference to the action of the lessor, and not to anything on the part of the lessee. We are, however, unable to accept this view as correct. The earlier passage, which the Subordinate Judge relies upon, refers to the rental and the terms and conditions settled between the parties, and states that it being agreed that the lessor should give to the lessee a lease of the lands upon such rental, terms, and conditions, the lease is granted. We fail to see how this passage can show what the intention of the parties was as to the granting of a new lease as expressed in the latter part of the document. It seems to us that inasmuch as a new lease could not be given unless the parties were agreed as to the terms and conditions thereof, the mere offer on the part of the lessor to grant a new lease, and this without any terms being mentioned, could not operate as the giving of such a lease, within the meaning of the document in question. The Subordinate Judge, we observe, further states that the liability of the lessor to pay the price of the buildings was contingent on the refusal to grant a fresh lease and not on the lessee's refusal to take such lease; and that indeed, the defendant was not bound to make any offer. We do not understand what the Subordinate Judge means by saying that the defendant was not bound to make any offer. But leaving this aside, let us suppose that the lessor offered to grant a fresh lease to the plaintiff on the most exorbitant terms, which the lessee could not possibly accept: would that be a true and *bonâ-fide* compliance with the conditions of the lease? We think not. The Subordinate Judge, however, remarks that there is nothing to show that the lessor refused to grant a fresh lease on fair and reasonable

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terms, and, therefore, there was no ground for a reference to arbitration. We have already referred to the fact that in his letter of the 29th July 1899, the defendant did not mention any terms or conditions, and indeed the parties from the very beginning did not indicate any intention of any fresh lease being settled upon reasonable terms. That being so, we are unable to agree with the view which the Subordinate Judge has expressed. We hold that there was no sufficient compliance on the part of the defendant with the terms of the lease of the 1st December 1884, relating to the grant of a fresh lease, and that it follows from this, that if the lessor, without granting a fresh lease, chose to take possession of the land, the lessee was entitled to insist upon the valuation of the buildings standing thereupon being determined by three persons to be nominated as provided in the lease.

But the real difficulty, which arises in this case, is whether the reference to the three persons nominated by the plaintiff for the purpose of fixing the value of the building, was a reference to arbitration, and whether the award made by them was such as could be filed in Court, as contemplated by section 525 of the Code of Civil Procedure.

We shall discuss this matter presently; but before we do so, we may perhaps say that we agree in the conclusion arrived at by the Court below, that the arbitrator appointed by the defendant was not a duly authorized arbitrator, and that having regard to the facts disclosed in the various correspondence on the subject between the parties, the plaintiff was justified in appointing all the three persons, and that there is nothing, so far as we can see at present, to vitiate the determination made by those persons.

Addressing ourselves then to the question which we have already indicated, it will be observed on a reference to Chapter XXVII of the Code, which deals with reference to arbitration, that section 525 and the following sections which refer to arbitration without the intervention of a Court of Justice, have to be read with, and by the light of the preceding sections in the same Chapter, which refers to arbitration through the intervention of Court, so far as they may be applicable. And when section 525 says that:—“ when any matter has been referred to arbitration without the intervention of a Court of Justice, and an award has



been made thereon," it must be understood in the same sense as a reference to arbitration as contemplated by section 506 of the Code. That section runs as follows:—"If all the parties to a suit desire that any matter in difference between them in the suit be referred to arbitration, they may, at any time before judgment is pronounced, apply in person or by their respective pleaders specially authorized in writing in this behalf, to the Court for an order of reference," and so on. The question here arises whether there was any matter "in difference" between the parties which could be referred to arbitration; and this question has to be answered by the terms of the lease of the 1st December 1884. It was therein contemplated that in the event of a new lease not being given, the lessor would be at liberty to take direct possession of the land, and take over all the buildings at a valuation arrived at by three arbitrators. At that time, there was, and there could be, no difference between the parties concerned, for no building had then been erected on the land; and we are unable to find upon the correspondence which took place between the parties, that there was any difference between them as regards the true price of the buildings. The plaintiff no doubt insisted that the matter of the price should be determined by arbitrators, while the defendant averred that the matter could not go to arbitration by reason of his having offered to give a fresh lease to the plaintiff, but that in order to meet any difficulty that might arise as regards the construction to be put upon the terms of the lease, he would appoint the person nominated by him.

In the case of *Collins v. Collins*(1), where the parties entered into a contract to purchase a brewery and plant at a price to be fixed by arbitrators who were to choose an umpire before entering upon the valuation, and the arbitrators could not agree on an umpire, and the question was raised whether the Court had authority under 17 and 18 Victoria, c. 125, to appoint an umpire for such a purpose:—it was held that the Court had no authority to appoint an umpire for the said purpose. The Master of the Rolls in the course of his judgment made the following observations: "It becomes necessary, therefore, to consider what an arbitration is. Now I fully concur in the observations, that fixing the price of

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(1) (1858) 26 Beav. 306.

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a property may be 'arbitration.' But I do not think that in this particular case the fixing of the price of the property is an arbitration in the proper sense of the term. An arbitration is a reference to the decision of one or more persons, either with or without an umpire, of some matter or matters in difference between the parties. It is very true that in one sense it must be implied that although there is no existing difference still that a difference may arise between the parties; yet I think the distinction between an existing difference and one which may arise is a material one and one which has been properly relied upon in the case." Later on he observed:—"It may well be, that the decision of a particular valuer appointed might fix the price and might be equally satisfactory to both; so that it can hardly be said that there is a difference between them. Undoubtedly, as a general rule the seller wants to get the highest price for his property, and the purchaser wishes to give the lowest, and in that sense it may be said that an unexpected difference between the parties is to be implied in every case, but unless a difference has actually arisen, it does not appear to me to be an arbitration." And then he approvingly referred to the case of *Leeds v. Burrows*(1) where the true distinction between an arbitration in the proper sense of the term, and an appraisement or valuation of a property, was drawn. The principle underlying this case is equally applicable here.

*In re Carus-Wilson and Greene*(2), where one of the conditions to the sale of a piece of land was that the purchaser should pay for the timber on the land at a valuation, and it was provided, for the purpose of such valuation, that each party should appoint a valuer, and the valuers thus appointed should, before they proceeded to act, appoint by writing an umpire, and that the two valuers, or, if they disagreed, their umpire, should make the valuation, and where the two valuers appointed being unable to agree, the umpire made the valuation, it was held that such valuation was not in the nature of an award or an arbitration. Lord Esher, M. R., in delivering judgment, observed as follows:—"The question here is, whether the umpire was merely a valuer substituted for the valuers originally appointed by the parties in a certain event

(1) (1810) 12 East 1.

(2) (1886) L. R. 18 Q. B. D. 7.

or an arbitrator. If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an enquiry in the nature of a judicial enquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of arbitration. The intention in such cases is that there shall be a judicial enquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration, but of a mere valuation." Later on he observed:—"I think that this case was clearly not one of arbitration, and that it falls within the class of cases where a person is appointed to determine a certain matter, such as the price of goods, not for the purpose of settling a dispute which has arisen, but of preventing any dispute" and so on.

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Lindley, L. J., while agreeing in the same view, observed:—"A valuer may be in one sense called an arbitrator, but not in the legal sense of the term. In the ordinary cases of arbitration there is a dispute which is referred. The object of the valuation on the other hand is to avoid disputes" and so on. This case has been followed in our Court in the case of *Choonney Money Dasse v. Ram Kinkur Dutt* (1). There, the suit was for an injunction and damages for encroachment upon the property of which the plaintiff (a Hindu widow) was a life-tenant, and an order was made by consent that the defendant was to purchase the plaintiff's interest in the said property and pay her the price to be settled by certain referees nominated by the parties: the price of the property was ascertained and reported upon by the referees to the Court, and judgment was given by Ameer Ali, J., in favour of the plaintiff according to the said valuation treating it as an award. But it was held by the Appellate Court that the referees were, in effect, rather valuers, than arbitrators, and no judgment therefore could properly be given under section 522 of the Code of Civil Procedure in terms

(1) (1900) I. L. R. 28 Calc. 155.

1908 of their award. Maclean, C.J., in delivering the judgment of the Court, observed as follows:—

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“It may well be that it was intended, in making that order (i.e., the order of reference to the referees) to make one under section 506, but obviously it cannot properly be regarded as one under that section, for what the so-called arbitrators and umpire were to decide was not any matter in difference between the parties in the suit, but merely to settle the price of the plaintiff's share and interest in the disputed property. They were in effect rather valuers than arbitrators [see *In re Carus-Wilson and Greene* (1)], and if the reference were not properly a reference under section 506, it is reasonably clear that no order could properly be made under section 522, the section under which the learned Judge purported to act.”

In the present case, though the reference was not through the intervention of the Court but a private reference, yet the same reason and principle would equally apply, for the question we have here to determine is whether there was “any matter in difference” between the parties, which could be, and was referred to arbitration, and whether the valuation, as made by the three persons appointed by the plaintiff, was an award within the meaning of section 525 of the Code. And it seems to us that this question must be answered in the negative. If, then, there was no award, it is obvious that the determination of the value of the buildings as made by the three persons appointed by the plaintiff could not be filed in Court in accordance with the provisions of that section, nor can a decree be made as provided by section 526 of the Code.

In this view of the matter, we are unable to give the plaintiff any relief in this case. He has evidently misconceived his remedy. But what may be the remedy that he is entitled to seek, is not for us to say on this occasion. In the result, we think this appeal must be dismissed, but in the circumstances each party will bear his own costs.

*Appeal dismissed.*

R. G. M.

(1) (1886) L. R. 18 Q. B. D. 7.

## PRIVY COUNCIL.

MAHAMMAD AFZAL KHAN

v.

GHULAM KASIM KHAN.

P. C.\*  
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. Feb. 12, 18,  
16.  
May 15.

[On appeal from the Chief Court of the Punjab.]

*Nawab of Tánk—Succession to estate of Punjab ruling Chiefs—Custom—Impartible estate—Primogeniture—Estates appertenant to Nawabship of Tánk—Grant of village by Nawab as maintenance—Cash allowance granted by Government—Effect of Government settlement.*

The country known as Tánk proper belonged to the Chief for the time being who was both ruler and proprietor. Succession in the family devolved upon the eldest son of the Chief, the other members of his family being entitled to maintenance only.

When the settlement of the country was made after the introduction of the British Rule in 1849 the claim of Nawaz Khan, the then Nawab of Tánk, was in 1854 admitted to seven villages in the pergana of Tánk :—

*Held*, that the effect of this settlement was not to create a fresh estate subject to the ordinary law of inheritance, but to continue to the Chief for the time being, as it were *jure coronæ*, the proprietorship of the villages which had been founded by his ancestors and the succession to which had theretofore been regulated by the custom of the family. This view is confirmed by what took place in 1875 when the Government conferred upon Nawaz Khan as an hereditary jagir a cash allowance of Rs. 25,000 per annum, together with the land revenue of the seven villages, and in sanctioning the grant made no change in the position in which the Nawab already stood in regard to the proprietorship of these villages as distinguished from their liability to payment of Government revenue.

Another village had been granted by Nawaz Khan to the defendant, his second son, for his maintenance. In 1882 the Government sanctioned the appointment of the plaintiff, the grandson of Nawaz Khan, to be Nawab of Tánk, and also to the entire jagir and cash assignment enjoyed by the late Nawab subject to a deduction of Rs. 5,000 for the maintenance of the defendant :—

*Held*, as to the seven villages, that they appertained to the Nawabship and the plaintiff was entitled to recover the half share which had been recorded in the defendant's name. As to the other village the defendant was entitled] to it, and could retain it and the cash allowance without being put to the election which he would take; that allowance and the assignment of the village coming from different sources and being independent of each other.

\* *Present*: Lord Mac aghten, Lord Robertson, Lord Lindley, Sir Andrew Scoble and Sir Arthur Wilson.

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APPEAL from a decree (3rd January 1898) of the Chief Court of the Punjab varying a decree (26th November 1894) of the District Judge of Dera Ismail Khan by which the respondent's suit had been dismissed with costs.

The defendant, Mahammad Afzal Khan, appealed to His Majesty in Council.

The suit was brought to recover the half share in the possession of the appellant in seven villages in the perguna of Tánk, in the Dera Ismail district of the Punjab, and of the whole of another village called Dabarra. The respondent claimed to be entitled according to the custom and practice of the family as Chief or Ruler of Tánk, he having been so appointed under the orders of the Government of India dated 6th October 1882. The plaintiff was then 13 years of age. He was a grandson of the late Nawab Shah Nawaz Khan, being the son of his elder son, and he was under the above orders appointed "to succeed to the title and position of Nawab and Chief of Tánk, and also to the entire jagir and cash assignment enjoyed by the late Nawab."

The defendant, the present appellant, was the second son of Nawab Shah Nawaz Khan. He contended that the Tánk inheritance was not impartible and did not descend by the rule of primogeniture as alleged by the plaintiff: he claimed to be entitled to a moiety of it; and to the whole of Dabarra, which last named village he asserted had been granted to him by his father for his maintenance.

The first Court dismissed the suit and the plaintiff appealed.

The history of the case and the statement of the facts leading up to the suit out of which this appeal arose are fully set out in the judgment of the Chief Court of the Punjab (STODDON and REID, JJ.) which was as follows:—

"For the proper elucidation of this case a slight sketch of the history of the Tánk Tahsil and of its previous occupiers and rulers is necessary.

The Tánk Tahsil occupies the North-West corner of the Daman or high plain Trans-Indus in the Dera Ismail Khan district. For assessment purposes it is divided into four circles known by the names of Kundi, Bhittani, Gomal and Jatatar. The tribes of the Suris, Pabbis, Prangis and Dress Khels belonging to the Lodhi branch of the Afghan nation settled in the Dera Ismail Khan district in the beginning of the 13th century. They occupied Tánk. In the time of the great Akbar the Lohanis, themselves a branch of the Lodhi family, having been expelled from their homes in the Ghazni mountains by the Suleman Khels, commenced to

settle in Tánk. The leading clans of the Luhanis were the Marwats, the Daulat Khel, the Mian Khel and the Jatatars. They quarrelled with the Prangis and Suris, and under their Mallik, Khan Zaman, defeated and dispersed them. Eventually the Daulat Khel and Jatatars settled down in Tánk. The Daulat Khel include a number of smaller tribes, among which is the Katti Khel to which the Chiefs of Tánk belong. The Kundis are another tribe that settled in Tánk either with the Daulat Khel or soon after. They now occupy the large villages of Pai Ama Khel and Drikki and some others in the northern portion of the Tánk Tahsil. Later on the Ghorazais and Mianis settled in the Gomal valley. Khan Zaman, already mentioned, lived about the time of Akbar and was a man of note. His immediate successors, Ghazi Khan and Salim Khan, were men of no influence and authority. Salim Khan was followed by his son, Katal Khan, an active enterprising man, who took part in the Durrani expeditions into Hindustan and acquired a good deal of power in his tribe by means of the wealth he brought back with him. He was murdered probably about 1782 or 1783 by members of his own tribe, who objected to his attempt to establish his yoke over them. His eldest son, Sarwar Khan, then sixteen years old, fled to the Court of Taimur Shah, who despatched a force to reinstate him. On being reinstated he strengthened his position by gradually killing off all the leading men of the Daulat Khel, till he reduced the tribe to its present feeble state. He built a large fort at Tánk and established himself as an absolute ruler over all the surrounding country. This acquisition of power by one man differentiates the history of the Daulat Khel clan from that of the Gandapur, Mian Khel, Ballar and Mehtaram clans, which seized tracks as clan property and divided them as such; while in Tánk Katal Khan and after him Sarwar Khan usurped the rights which belonged to the whole clan, and killed or drove out of the country almost all the clansmen. The colonisation of the south-east portion of the Tahsil with Jats, which had commenced under Katal Khan, went on rapidly under Sarwar Khan, and numerous villages were founded. The tract so colonised is known as Jatatars or Jats tract or Tánk proper. At the time of the last settlement it contained 67 villages, and as regards it, the opinion of Lord (then Mr. John) Lawrence, Chief Commissioner of the Punjab, expressed in a memorandum, dated 17th March 1854, was that the Chief (he was speaking of Sarwar's son, Aladad) was virtually the Chief and the landed proprietor of the whole of Tánk. This opinion, it may be noted, is admittedly correct.

Katal Khan paid no tribute to the Durrani princes. As Sarwar Khan was enabled to establish his authority only with the King's assistance, he was made to pay a cash tribute of from Rs. 8,000 to Rs. 12,000. In 1809 the Durrani Monarchy was broken up, and for some years Sarwar Khan remained practically independent. About 1821 he submitted to Ranjit Singh and agreed to pay tribute. It first amounted to Rs. 12,000 or Rs. 15,000, but it was gradually enhanced to Rs. 40,000. Sarwar Khan died in 1836. Nao Nihal Singh raised the tribute to a lakh. Aladad Khan, who had succeeded his father, Sarwar Khan, being unable to meet the Sikh demands, fled to the Waziri hills, whence he made perpetual raids on the Tánk villages. Nao Nihal Singh annexed Tánk, but as Aladad's raids made it an unprofitable acquisition, the Sikh Government assigned the whole province in jagir to three leading Multani Pathans of Dera Ismail Khan, known

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thenceforth as the Tánk Khaus. To these was allotted nine-tenths of the Tánk revenue, the remainder being divided in smaller grants to Sahibdad Khan and Khudadad Khan, the younger sons of Sarwar Khan, to Shah Nawaz Khan, the son of the refugee, Aladad Khan, and to Mian Khan, Kundi, and some others of the leading men of the ilaka. The political state of Tánk during the reign of the Multani Chiefs was closely bound up with the history of the quarrel between Fattah Khan, Tiwana, and Diwan Daulat Rai (as to which see Tucker's Settlement Report, pages 60, 61). When Fattah Khan was put in as Governor of Dera, it was arranged that Aladad should be restored to the Government of Tánk on an allowance of Rs. 20,000 a year, but he died on the road as he was marching down to take possession. Shortly after his son Shah Nawaz Khan lost his pension and became a fugitive. In 1847 the Sikh Darbar resumed the Tánk jagir, and on Sir Herbert Edwardes's recommendation, the management of the ilaka was entrusted to Shah Nawaz Khan, to whom a lease was given for five years. Sir Herbert Edwardes fixed the revenue at a lakh, of which Shah Nawaz Khan was to retain Rs. 25,000 for expense of collection and administration, and to pay Rs. 75,000 to Government.

In 1854 Major Nicholson made a summary settlement for three years, village by village, the leases being, as a rule, given to the leading zemindars of each village. Shah Nawaz Khan himself retained only the lease of Tánk and of two or three other villages. By sanad, dated 3rd June 1854, he was recognised as Rais or Chief of Tánk and entrusted with the police and revenue management of the country denominated the taluqa of Tánk, under the order of the Deputy Commissioner Dera Ismail Khan. He was to get one-third of the revenue collections, including one-eighth of the revenue, as inam semindari in recognition of his being the Rais of Tánk, and on his death the Chiefship was to descend to the most efficient and trustworthy of his sons on similar conditions. Mr. John Lawrence in the memo. already quoted considered that the grant of an inam would give him position and consideration among the Pathan gentry of the border; and that whereas he had hitherto been only the farmer of the inheritance of his ancestors, he would thenceforth be looked on as restored to a portion of their rights and privileges. In 1857 Captain Coxe effected a second summary settlement of the Tánk Tahsil. Shah Nawaz Khan, who had in the same year been given the title of Nawab, was continued in the enjoyment of a third of the increased revenues. The villages were farmed as before to the leading zemindars. Rights in land were left very vague, and except in the Kundi villages to the north and those of the Gomal valley, the *milkiyat* of the whole Tahsil was recorded by Captain Coxe as Sarkari or belonging to Government. At the present settlement Shah Nawaz Khan was very eager in urging his claims to be recognised as proprietor and to recover the leases of the Sarkari villages.

He claimed to be proprietor of sixty-seven villages, *viz.*, of fifty-seven in Tánk proper and of ten in the Kundi country. These villages made up the whole of the Tánk Pergana with the exception of, first, the Gomal country consisting of four large villages, named Gomal, Ghora zai, Ghasha and Sarang zona, and, secondly, three large villages of old standing in the Kundi country, named Pai, Amar Khel and Drikki. They are said to have been founded before his family rose to power, and he did not assert proprietary title to them. The recommendations of the Panjab



Government regarding the administration of the Pergana, the Nawab's claims to proprietary right and other matters were submitted to the Government of India by letter No. 233A., dated 17th February 1873. The final orders of the Government of India were communicated by letter dated 29th January 1874. As stated by Mr. Tucker in paragraph 230 of his Settlement Report, the Government of India considered that the orders passed on Major Nicholson's report involved a surrender of all Government proprietary rights in the Tahsil in favour of the persons with whom the settlement had then been made, and that such rights could not be made over to the Nawab. The result was that, though it was admitted by the Punjab Government that in Tánk proper the Chiefs had been to all intents and purposes proprietors as well as Chiefs, and that the cultivating body had no claim to be recorded as proprietors, the Nawab was recorded as proprietor only of those villages of which he had held the lease, or of which he was found to be in possession. The villages in question are: 1, Tánk; 2, Hayat; 3, Budha; 4, Baloch; 5, Kaura; 6, Daggar; 7, Rakh Ranwal. His financial position was, however, much improved by an order of the Punjab Government, passed on the 25th January 1875, and based on the Government of India letter already quoted. It was ordered—

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1. That from the 1st February 1875 the Nawab be relieved of the cost and management of police.
2. That from the 1st April 1875 he be relieved of the cost of revenue administration, but retain his office of sub-collector, &c.
3. That his powers as a Magistrate be increased from the 2nd to the 1st class.
4. That his Civil Court powers be increased to those of an Assistant Commissioner with special powers.
5. That from the 1st April 1875, in lieu of the allowances received by him, *viz.*, one-third of the revenue collections of the Pergana, amounting to Rs. 23,000, more or less, subject to a charge of Rs. 16,000, more or less, on account of Police and Revenue administration, he should receive as hereditary jagir subject to no charge on account of Police or Revenue administration—

(i) The revenue of 1, Tánk Khas; 2, Budha; 3, Hayat; 4, Baloch; 5, Dabarra; 6, Kaura Khan; and 7, Daggar, then held by him on lease, such revenue then amounting to Rs. 6,124 per annum.

(ii) Further assignment from the revenue of the Tánk Pargana, amounting to the fixed sum of Rs. 25,000 per annum.

6. The said jagir to be held on condition of good service, and to descend from the Nawab integrally to the successor in the direct male line who might be selected by the Government as the most competent.

At settlement the revenue assessed on the villages detailed in paragraph 5 was enhanced to Rs. 7,574, which is the present nominal annual value of the jagir. Collections are, however, said to be made in kind and not in cash.

The Nawab, who was involved in debt, subsequently took up his residence in Lahore, where he died on the 10th January 1882. He was succeeded in the title jagir by Ghulam Kasim Khan, the present plaintiff, the son of his elder son, Mahammad Akbar Khan, who had predeceased him. Ghulam Kasim Khan was a

|                                                          |                                                                                                                |     |            |
|----------------------------------------------------------|----------------------------------------------------------------------------------------------------------------|-----|------------|
| 1908                                                     | minor, aged 18 years, when his grandfather died. The cash allowance of Rs. 25,000 was distributed as follows:— |     |            |
| MAHAMMAD<br>AFZAL KHAN<br>v.<br>GHULAM<br>KASIM<br>KHAN. | Ghulam Kasim Khan, plaintiff                                                                                   | ... | Rs. 18,000 |
|                                                          | Mahammad Afzal Khan, defendant, younger son of                                                                 |     |            |
|                                                          | Nawab Shah Nawaz Khan                                                                                          | ... | 5,000      |
|                                                          | Two widows of Nawab Shah Nawaz Khan                                                                            | ... | 2,000      |

The landed property of Nawab Shah Nawaz Khan at the time of his death may be divided into three groups, viz.:—

- (a) (1) Tank, (2) Hayat, (3) Budha, (4) Baloch, (5) Kaura, (6) Daggar, (7) Rakh Razwal.
- (b) (8) 189 Kanals, 9 Marlas, in Sarang zona; (9) 114 Kanals in Mahammad Akbar; (10) 86 Kanals, 17 Marlas, in Ghera zai.
- (c) (11) 2,802 Kanals, 14 Marlas, in Ghasha; (12) 82,865 Kanals, 7 Marlas, in Gomal.

The villages comprised in group (a) are in the Jatartar tract. They were founded either in the time of Katal Khan or in that of Sarwar Khan, and undoubtedly belonged to the Chief for the time being.

The lands comprised in group (b) were acquired by Shah Nawaz Khan by purchase or otherwise. Those comprised in group (c) are ancestral lands, succession to which is governed by the ordinary law or custom of inheritance obtaining in the Katti Khel tribe. There is a dispute as to whether the Ghasha land should be included in group (b) or in group (c).

The village of Dabarra would have been includable in group (a), but for the fact that at settlement the Nawab had it recorded as the property of defendant.

With the consent of the parties mutation of names was effected in their favour in equal shares. The order of the Deputy Commissioner of Dera Ismail Khan sanctioning it was passed on the 10th March 1882. The whole estate including Dabarra was then taken under the management of the Court of Wards, because plaintiff was a minor, and also because Shah Nawaz Khan had died heavily involved in debt, which it was desired to liquidate. About two years before suit it was released. During the time it was under management a sum of Rs. 5,000 out of the cash assignment used to be paid yearly to defendant, and on its release a sum of Rs. 18,122 was paid to him. On the 1st February 1892 he applied for partition of the greater portion of Shah Nawaz Khan's estate. He appears to have omitted Nos. 9 and 10. In his application he expressed his willingness to allow one-half of Dabarra to plaintiff provided that he did not object to the partition. Plaintiff, however, objected that he was not entitled to share in the property. On the 7th June 1892 he was given a month within which to institute a suit. His first plaint was filed on the 18th August 1892, but the plaint on which the suit eventually proceeded is dated the 3rd February 1894. The pedigree of the parties is as follows:—



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Plaintiff now admits that defendant is entitled to a share in Gomai, although at one time he denied his right thereto. He asserted that the rest of the villages and lands left by his grandfather were appurtenant to the Chiefship and on that ground he claimed possession of the half share in them held by defendant. He further claimed the whole of Dabarra on the ground that the Nawab was not entitled to alienate it. In the event of its being held that defendant was entitled to a share, he prayed that it might be declared that he would not be entitled to possession thereof by partition, unless he paid off his proportionate share of a sum of Rs. 1,40,000 spent out of the jagir income, additional allowance and income from landed property on the payment of Shah Nawaz Khan's debts. Finally he prayed for a decree for Rs. 15,000 cash unlawfully received by defendant from the Court of Wards. He alleged that defendant had obtained his consent to mutation of names by fraud and undue influence, and that he had taken advantage of his youth and inexperience. Defendant joined issue on all points, and alleged among other things that the lands known as Sarang Zona, Ghora Zai, Ghasha and Chakla formed part of the village of Gomai, his rights to half of which had not been denied by plaintiff.

The Lower Court dismissed the suit and plaintiff has appealed to this Court.

The first question in the case is what was the position of the Chiefs and of the members of their family with regard to the villages of Tánk proper; what was the effect of the change in the position of Aladad Khan towards that tract brought about by his flight and by the assumption of supreme control by the Sikhs and subsequently by the British Government; and in what capacity was Nawab Shah Nawaz Khan reinvested with a portion of the inheritance of his ancestors.

It will clear the ground to consider first whether the tribe to which the parties belong is governed in matters of inheritance by Mahomedan Law or by custom. As to this there cannot be any doubt that it is governed by custom. No instance can be shown in which Mahomedan Law has been followed. Mr. Tucker in paragraph 2 of Appendix No. XV to his Settlement Report states that as regards Mahomedans, the rules affecting inheritance and transfer of land laid down by the Shariyat are almost invariably disregarded. When a man dies his estate devolves upon his son or sons to the exclusion of all other persons who would have inherited under Mahomedan Law. The rule is too well known to call for further discussion, and the learned counsel for defendant has not attempted to argue that the parties are governed by Mahomedan Law.

A consideration of the oral and documentary evidence of the history of the tract and of the opinions of Government Officials leads us to the following conclusions:—

1. The country known as Tánk proper belonged to the Chief for the time being who was both ruler and proprietor.
2. Succession devolved upon the eldest son of the Chief, the members of his family being entitled to maintenance only.
3. If the old order of things had continued, Shah Nawaz Khan and after him plaintiff would have been sole proprietor of the whole of the villages in Tánk proper.
4. At the time of the last settlement it was generally recognised that Major Nicholson had gone too far in conferring proprietary rights on the dominant class in each village, and Shah Nawaz Khan would probably have been reinstated as

proprietor of the whole tract but for the fact that the Governor-General in Council considered that Government could not in justice alter the status accorded by Major Nicholson to the occupiers of the soil in 1854.

5. Government recognised the estate as an impartible one and re-granted it as such. The Nawab himself always asserted its impartibility.

6. If the principle of impartibility is applicable to the whole, it is applicable also to a part.

As regards the first three points the main argument for the defendant is that the country was in a disturbed state, that might was right, that Katal Khan was merely a successful adventurer, whose object was to aggrandize himself and the members of his own family at the expense of the members of the tribe, that as regards the former he was merely *primus inter pares* with no preponderating rights, and that the estate held by him was of too unstable a nature to be called inheritable. We are of opinion, however, that though Sarwar Khan had to fly after his father had perished, in his attempt to acquire supreme power, he was always recognised as Katal Khan's heir and rightful successor. Sarwar Khan himself was a vigorous and able ruler. According to Tucker, he took great interest in agriculture and irrigation, so that cultivation extended greatly under his rule. There was peace within his territories, though he was more or less engaged in border warfare. He was Chief for about fifty years, and for some years was practically independent. Such a man can hardly be called a mere adventurer. His power was gradually consolidated and was not of mushroom growth, and as far as he was concerned, his intention was certainly to hold the tract on his own behalf, and to transmit his rights to his eldest son. His brothers, Haibat Khan and Shahbaz Khan, lived with him, but the evidence shows that they were dependent on him, and that they had no share in the rights, either of Chiefship or of proprietorship possessed by their brother. On his death the estate devolved upon his eldest son, Aladad Khan, and though he soon had to abscond in consequence of the exactions of the Sikhs, it was always looked on as his inheritance, and but for his death, he would have been reinstated in it. Daulat Khan was his eldest son, but he became insane in his boyhood, and Shah Nawaz Khan, the second son, was always looked on as his father's successor. He was formally recognised by Government as Chief of Tánk in 1854, and it was declared that on his death the Chiefship would descend to the most efficient and trustworthy of his sons. Proprietary rights in the whole of Tánk proper would have probably been granted to him but for certain considerations which will be discussed later on. It will be as well to discuss here the tenure of the land in Gomal, and the litigation which has taken place regarding it, and to consider whether the distinction which is alleged to exist between it and the villages of Tánk proper is imaginary or real. We find that in 1257 Hijri, corresponding to about 1841 A.D., in the time of the Tánk Khans, there was litigation between Sahibdad Khan and Khudadad Khan, sons of Sarwar Khan, and Azam Khan and Sarbuland Khan, sons of Haibat Khan on the one side, and Sultan Khan and Zaman Khan, son of Amir Khan on the other, regarding certain lands in Gomal, and that they were partitioned between them by an award of the Multani Khans. In 1866 Sarbuland Khan, grandson of Katal Khan, sued Furrúkh Sher Khan for possession of lands in Gomal. From an intermediate order of Lieutenant Cavagnari,

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dated 6th December 1866, it appears that in 1854 Farrukh Sher Khan sued Shah Nawaz Khan for possession of ancestral lands in Gomal, praying that he might be awarded his share in accordance with Mahomedan Law. The Nawab pleaded that according to the custom and usage of the Katti Khel people succession devolved upon the person upon whom the *dastar* (turban) had been conferred, and that other members of the family who were of low position were not entitled to anything but maintenance. His contention was, however, over-ruled by General (then Major) John Nicholson, who ordered that the Gomal lands should be equally partitioned between him and Farrukh Sher Khan. Unfortunately, this decision is not forthcoming, and it is impossible to say upon what grounds it proceeded. It cannot have been founded solely on Mahomedan Law, because under that law Farrukh Sher Khan's share would have been considerably less than one-half. In execution of Major Nicholson's decree 19,587 kanals and 12 marlas were divided into two wands *viz.*, Northern wand 9,583 kanals and  $4\frac{1}{2}$  marlas, and southern wand, 80,064 kanals and  $7\frac{1}{2}$  marlas, of which Shah Nawaz Khan took the former and Farrukh Sher Khan the latter.

In 1866 Sarbuland Khan came forward and claimed one-half of the land awarded to Farrukh Sher Khan. He did not claim any portion of the Nawab's share, because he admitted the correctness of his allegation that the whole estate devolved upon the person on whom the *dastar* had been conferred. Enquiry was made as to how much of the land was acquired by Katal Khan, the common ancestor of the parties. The area acquired by him was found to be 11,101 kanals, and Sarbuland Khan was given a decree for one-quarter of it on the 16th December 1866. He then as agent of Musammam Jindo obtained a decree for one-half of the balance of the lands acquired by Katal Khan still held by Farrukh Sher Khan and also for one-half of the half of the lands acquired by Sarwar Khan, which Farrukh Sher Khan had obtained from the Nawab by suit in 1854-55.

The above proceedings are relied on as showing that the Gomal lands were acquired by Katal Khan and Sarwar Khan in the same way and at the same time as they acquired the tract known as Tánk proper, and that the Nawab, as he could not deny that Major Nicholson had refused to recognise his sole title to them in his capacity of Chief, was obliged to assert that they stood on a different footing from the Tánk villages, whereas in reality there was no distinction between them. It is suggested that the reason why there was no litigation about the Tánk villages was that the whole of them were recorded as the property of Government, and it is contended that Sarbuland Khan's admissions regarding the rights of Shah Nawaz Khan as Nawab are not entitled to any weight, because they were in league together and he was used by the Nawab as a tool to get back land of which he considered he had been wrongfully deprived by Major Nicholson. It must be admitted that there is considerable force in these arguments, but we are satisfied that the statements of Mr. Tucker and other officers regarding the difference between the tenures obtaining in the villages in the Gomal valley and those in Tánk proper are founded on independent research and not on statements made by the Nawab, and we have no doubt that the difference is real and not imaginary. How Katal Khan and Sarwar Khan obtained their lands in Gomal it is impossible to say, but it seems to be certain that they did not obtain them, as in the case of Tánk proper,

either by conquest of occupied or by colonisation of unoccupied tracts. The probability is that both Sarbuland and Musammât Jindo were in league with the Nawab, but this fact merely shows that he was not satisfied with Major Nicholson's judgment, and considering the summary nature of that Officer's settlement it is possible that his judgment was of an equally summary nature and unentitled to weight.

As regards points 4 and 5 the following extract from letter No. 898 P, dated 7th May 1873, from the Secretary to the Government of India, Foreign Department, to the Secretary to the Government, Punjab, is important as showing the view taken by the Supreme Government of the Nawab's position. The letter was written in answer to letter No. 233 A, dated 17th February 1873, in which the Punjab Government had recommended, among other things, that the Nawab should be compensated by a grant of proprietary right (equal to about Rs. 40,000 or Rs. 50,000) in the central section of the Pergana, i.e., in Tânk proper. As regards this the Secretary to the Government of India wrote:—"With reference to the question of compensation to the Nawab, I am to state that after an attentive perusal of the earlier correspondence regarding the Nawab's connection with the Tânk Pergana, His Excellency in Council entertains grave doubts as to the justice of the measures proposed. Meagre as were the records of Major Nicholson's settlement, there is enough to show that Government considered those with whom the settlement was made as the actual proprietors of their holdings. Major Nicholson's own language is unmistakable. In his letter of the 10th March 1854, he says, 'Of the 60 odd villages which composed the taluqa of Tânk direct engagements have been made with the dominant class in each village, except Tânk Khas, the chief township. This class in each village I would consider and record as proprietors of the soil, the parties with whom the profit and loss of the settlement will rest. Shah Nawaz and his descendants I would record as the raisers or head proprietors of the taluqa entitled, under certain conditions, to a share of the revenue of the district. In the same letter in reporting the Nawab's anxiety that a portion of his allowance should be termed inam-zemindari, Major Nicholson said:—"He affirms, and I believe with sincerity, that he has no desire to interfere in any way with the present proprietors. His anxiety is that the title of Khan of Tânk may remain in his family, &c." The language of the Commissioner of the Division and of the Chief Commissioner (Sir John Lawrence) in his Memorandum is equally clear. As between the Nawab and the community then the case appears to have been correctly put by Colonel Lake in 1865. His view seems to have been, 1st, that it was distinctly held in 1854 that although the ancestral position of the Nawab was admitted, nevertheless, as he had long been dispossessed and as in the interval his proprietary rights had been enjoyed by others, he could not claim to recover them as hereditary right, and 2nd, that otherwise the Nawab would claim as a right and not as a favour, and that the question ceased to be one of policy and became one of law. That Captain Coxé at the late settlement recorded the lands as the property of Government does not affect the question. In the first place his authority to do so may well be doubted. But what is more to the point, the question is not one of names but of rights actually enjoyed, and it would appear that, whatever Captain Coxé may have recorded in his settlement papers, he left to the people the entire profit of the

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and after paying the Government revenue assessed on them, and exacted from them nothing whatever in the shape of rent or proprietor's dues. From this fact His excellency in Council considers that Government cannot now in justice alter the status accorded to the occupiers of the soil in 1854, that Government cannot revive proprietary claims for itself and still less in order to confer the benefits of them on some one else. If then the Nawab is to be compensated and to have his pecuniary position improved, this should be done at the expense of Government and not by withdrawing from the people property which we conferred on them 20 years ago and have allowed them uninterruptedly to enjoy. That the Nawab's position does require to be improved admits of no doubt, &c., &c."

Mr. Tucker evidently had considerable doubts as to the correctness of the view entertained by the Government of India regarding the position of Major Nicholson's leaseholders (*see* paragraph 230 of his report), but the orders of Government were of course final and binding, and effect had to be given to them. The compensation eventually given to the Nawab is detailed in the Sanad of the 25th January 1875.

From the above it may be gathered that the Government of India would have restored proprietary right in the whole of the villages in Tánk proper to Nawab if it could have done so without causing injustice to others, and that as it could not restore it, it granted him as compensation an assignment of Rs. 25,000 per annum from the revenue of the Tánk Pergana. This sum, together with the remitted revenue of the villages belonging to him, may be taken as representing the income which would have accrued to him as proprietor of the whole tract paying revenue to Government. In a certain sense therefore he was restored to his proprietary rights, but at the expense of Government and not at that of the leaseholders. If we had no claims, it is hardly likely that his position would have been so vastly improved. The nature of the grant shows the nature of the policy of Government as regards the Nawab's position. It was to descend from the Nawab integrally to the successor in the direct male line who might be selected by the Government as the most competent, or in other words, Government said to the Nawab, "as regards your own villages we made them over entirely to you and remit the revenue for ever, and your successor in the title will get the sole benefit of that remission. As regards the villages which ought to be yours, but which we are prevented by circumstances from restoring to you, we compensate to you to the extent of Rs. 25,000 per annum, and when you die your successor in the title will succeed to the whole of this sum also. The dignity of the Chiefship will be thus maintained, and the income allotted for its maintenance will not be frittered away by partition among your natural heirs."

As regards the villages in group (a), it is doubtful whether the Nawab's proprietary rights were ever lost, though they may have remained in abeyance for a time. The Government of India regarded Captain Coxe's action in recording Government as proprietor of the Tánk villages as *ultra vires* and disowned it, and notwithstanding the record of Government's proprietary rights the *wajib-ul-ars* of the villages in group A declare that nobody, except Mahammad Shah Nawaz Khan, is competent to mortgage or sell the lands of the village. If then the Nawab's rights were never extinguished, the estate should, in accordance with family custom,



devolve upon the eldest son. If there was a re-grant, there is nothing to show that Government intended to create a fresh estate, subject to the ordinary law of inheritance. On the contrary, its intention appears to have been that the estate should descend integrally to the Chief for the time being, although it is possible that such Chief may not in every case be the eldest son of the previous Chief, or such eldest son's senior representative, or that he may even be chosen from the junior to the exclusion of the senior line. Nawab Shah Nawaz Khan, it may be noted, declared that the villages in Tánk proper always went with the title (of Rais or Nawab), and not according to the ordinary rules of inheritance [see note by Sir (then Mr.) J. B. Lyall on Mr. Tucker's memo. on Tánk, dated 14th January 1872]. This consideration led me to ask that separate provision might be made for his younger son, Mahammad Afzal Khan, in the event of his elder son, Mahammad Akbar Khan, being selected by Government to succeed him as Nawab and Jagirdar, and the family history, given along with the pedigree included in the Tánk settlement record, shows that he asserted that only that person held possession of the land who possessed the title of Nawab and that no other person, except the Chief for the time being, had any connection with it. Under such circumstances it seems extraordinary that plaintiff should have consented to mutation being effected in defendant's favour; but as he was only thirteen years old at the time, the probability is that he knew nothing about his grandfather's opinion on the subject, and of course no weight can be attached to his admission. Mir Alam, son of Sarbuland Khan, was Tahsildar of Tánk at the time, and it is possible that his action was not wholly disinterested. On the whole we think that this is a case in which, to quote the words of their Lordships of the Privy Council, in *Nitr Pal Singh v. Jai Pal Singh* (1), "all the lines of evidence examined converge on the same point. Perhaps no one of them would, standing alone, be conclusive in favour of the plaintiff's case, but taken as a whole they are conclusive." We therefore hold that plaintiff as Nawab is entitled to sole possession of the seven villages included in group (a).

As before remarked the village of Dabarra would have been includible in group (a), if the Nawab had not given it to defendant at the Settlement. It is therefore necessary to consider the circumstances under which the gift was made and whether it is valid.

Dabarra is situated on the borders of the Gomal valley. It was founded by some people of the Yakub Khel tribe who deserted it in the time of the Multanis. Subsequently people of the surrounding villages cultivated portions of the area from time to time. On the 1st December 1863, defendant who was then about four years old, offered to found a new village, on condition of a settlement being made with him at reasonable rates. The offer was of course really made by Shah Nawaz Khan in defendant's name. It was accepted. On the 30th January 1876, Mr. Tucker asked the Nawab to inform him whether the village should be entered as his property or as that of defendant. He replied on the 31st March 1876, that as the matter relating to the grant of revenue to the Assessors and Maliks was pending before the Government authorities, he could not make any suggestions and the authorities might make whatever entry they deemed proper. Upon this Mr. Tucker ordered that the Nawab should be recorded as proprietor. On the 23rd

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(1) (1856) I. L. R. 19 All. 1; L. R. 23 I. A. 147.

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June 1876, the Nawab wrote: "As the village is my property and has been granted to me in jagir, and as my son has for a long time been entered as its proprietor, I pray that the whole of the village be granted to him and that it be entered in the Settlement Record as his property, so that he may remain in possession of it and enjoy the whole of its produce, while I will have nothing to do with the village." In accordance with this request, defendant was recorded as proprietor of the village, but it is clear from his evidence that the Nawab enjoyed the income accruing from it, as long as he lived, and after his death it was managed by the Court of Wards along with the other villages, and the income was not enjoyed by the defendant, but was devoted to the liquidation of the Nawab's debts. As already stated, the Nawab had always maintained that the villages in Tánk proper were impartible and attached to the Chiefship. Plaintiff's father, Mahammad Akbar Khan, was alive at the time, and the Nawab naturally looked upon him as his successor. He had been told by Colonel Munro, Commissioner of the Derajat, in January 1875, that it rested with him to make provision for defendant's maintenance, and we have no doubt that he had him recorded as proprietor of Dabarra, with the intention that it should devolve upon him at his death, and that he should not be left to the tender mercies of his elder brother. There is evidence that the Nawab attempted to obtain the consent of Mahammad Akbar Khan to the proposed transfer, but without success. It may be true, but we cannot say that we attach much weight to it, and the matter is not of much importance. We look upon Dabarra as an appanage conferred on defendant as a younger son of a Chief for his subsistence, and as such he is entitled to keep it. Probably he is not full proprietor and any alienation effected by him would not inure beyond his life-time, at all events as against the Chief, but it is not necessary for us to decide the point. We should have had no difficulty about maintaining his possession of the village, but for the fact that Government has diverted for his use Rs. 5,000 of the grant, which ought to have descended integrally to plaintiff. The Sanad declares that both the jagir and the cash assignment will descend undivided to that one of Mahammad Shah Nawaz Khan's lineal heirs-male as may from time to time be selected by the Government to the dignity of Nawab. The Lieutenant-Governor recommended that the entire jagir and cash assignment enjoyed by Shah Nawaz Khan should descend to Ghulam Kasim Khan subject to the burden of Rs. 5,000 and Rs. 2,000 cash allowances recommended for Mahammad Afzal Khan and the two widows, the said allowances being granted upon the express condition that they would lapse to the Nawab for the time being upon the death of the recipients or in the case of the widows, upon their re-marriage. These proposals were sanctioned by the Government of India on the 6th October 1832. We think that s. 4 of the Pensions Act, 1871, prevents us from interfering in any way with the arrangement made by Government, but as it was illegal and in contravention of the Sanad, we consider that we are entitled to call upon defendant to elect which maintenance he will take, that provided by his father or that provided by Government. He is not entitled to keep both Dabarra and Rs. 5,000 per annum. It is hardly necessary to say that he can have no possible claim to retain the whole of Dabarra along with one-half of the other villages. His father assigned the village to him for his maintenance, and the assignment would never have been made if he had contemplated the possibility of his succeeding to a half share in the other villages. We purpose to give plaintiff a decree for the possession

of Dabarra, subject to the condition that such decree will not be executed if, within six months, defendant elects to keep Dabarra for his maintenance and to forego all claim to the sum of Rs. 5,000 per annum paid to him out of the grant, to the whole of which plaintiff is entitled.

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The lands comprised in group (b) were acquired by Mahammad Shah Nawaz Khan. Their area is insignificant. It is urged that such acquisitions must follow the general rule and that it must be presumed that they were made from funds acquired by the Nawab as Chief. We are not, however, prepared to accede to the argument, and do not find sufficient grounds for holding that they should not descend in accordance with the custom of inheritance prevailing in the tribe of the parties.

The file is silent as to how and when the Ghasba lands were acquired, but there is a statement at the foot of the Gomal pedigree table, that all Nakini or ancestral lands of Sarwar Khan's descendants together with those situated at Ghasba were partitioned among Nawab Mahammad Shah Nawaz Khan, Farrukh Sher Khan and Musammat Jindo, as ancestral property. Probably the Ghasba lands were included in the litigation regarding Gomal lands, which has been already described, and we are not satisfied that defendant is not entitled to share in them. The arrangement made for the liquidation of the Nawab's debts was as follows:—The whole of the estate was taken under the management of the Court of Wards. Of the grant of Rs. 25,000 per annum, Rs. 5,000 were paid to defendant and Rs. 2,000 to the widows. There remained Rs. 18,000 plus the jagir income realised in kind and the income realised from proprietary rights. The cost of the plaintiff's maintenance and education was defrayed out of them, and the balance was applied to the liquidation of the debt. A statement of income and expenditure from March 1882 to March 1892 has been filed. It shows that the income was Rs. 3,57,016-5-10, of which Rs. 1,29,625-5-11 were expended on payment of the Nawab's debts and Rs. 1,86,199-14-5 more or less on plaintiff's education, maintenance, and marriage, improvement of the property and establishment. A balance is shown of Rs. 62,191-1-6, viz., Rs. 41,141-1-6 cash and Rs. 21,000 in Government Promissory Notes. There is doubt as to the exact correctness of the totals, but they are sufficiently exact for the purposes of this judgment. If defendant is really entitled to a half share in the whole estate, the arrangement was not an equitable one. The income derivable from the grant of Rs. 25,000 and the jagir was not liable for the payment of the debts of Shah Nawaz Khan in the hands of his successor. If it be conceded that the claims of creditors could be enforced against his landed estate, such claims should have been satisfied out of the income accruing from such estate and not out of funds which the creditors could not touch. According to the statement the income from landed property was only Rs. 80,702-7-5. If it be taken that the whole of this sum was devoted to the liquidation of the debt, there still remains a balance of Rs. 48,922-14-6 which must have been defrayed out of plaintiff's grant and jagir. As, however, the effect of our decree will be to confer upon plaintiff the bulk of the property, it is only fair that he should pay the bulk of the debts. Objection is taken to the payment of Rs. 5,000 per annum to defendant out of the grant, but he had to live, and if he had not received this sum, he would have been entitled to retain Dabarra for his

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maintenance. Probably the annual income derivable from that village falls short of Rs. 5,000, but the presumption is that in a family arrangement of this kind, the authorities had the welfare of all parties in view, and the Courts should not interfere except upon the most cogent grounds. We have not the will, even if we have the power, to dispossess defendant from the share of the estate found to be his, nor are we prepared to declare that he will not be entitled to partition and separate possession of such share until he pays plaintiff a certain sum of money. We have no details of the sum of Rs. 13,622 or Rs. 14,122 paid to him on the release of the estate from the Court of Wards; and considering the length of time the suit was pending in the lower Court, and the fact that, in his first plaint, plaintiff did not ask for a money decree, we do not think that we should be justified in remanding the case for further inquiry, and we must hold that plaintiff has not sufficiently established his right to the sum claimed or to any portion of it.

In conclusion we would note that the questions in dispute between the parties are questions of great nicety and difficulty, regarding which there is room for considerable difference of opinion. The fact that the grants were tenable during the pleasure of the British Government and are conditional upon good conduct and loyal service, caused us to hesitate about admitting plaintiff's claim to the villages in Tánk proper, for it is evident that if the grant is resumed, the Nawab for the time being will be a personage of little or no importance. His position will be that of an ordinary landowner and not that of a Chief, but the Courts must pass their judgments on the evidence before them and must not be influenced by the consideration of improbable contingencies. As a matter of policy it is probably important that the Nawab's position should be strengthened as much as possible.

We so far accept the appeal as to give plaintiff a decree for possession of defendant's recorded half share in the villages (1) Tánk; (2) Hayat; (3) Budha; (4) Baloch; (5) Kaura; (6) Daggar; (7) Rakh Ranwal. We further give plaintiff a decree for the possession of Dabarra, with this proviso, that the decree will not be executable if, within six months from this date, defendant renounces all claim to the allowance of Rs. 5,000 per annum made to him by Government out of plaintiff's grant. If he either refuses or fails to renounce such claim within such period, then plaintiff will be entitled to execute his decree. We dismiss the rest of the claim, and, having regard to the nicety of the questions between the parties and to the fact that plaintiff has only partially succeeded, we leave the parties to pay their own costs throughout."

On this appeal,

Asquith, K.C. and *De Gruyther* for the appellant contended that the respondent had not established any special custom which would give him the right to exclude the appellant from the ownership of the half share of the seven villages of which he was in possession. Both the Courts below had concurrently found that the proprietorship of Nawaz Khan in the seven villages, was, under the settlement proceedings of 1854, heritable according to the local custom. Punjab Laws Act (IV of 1872 as amended by

Act XII of 1878), ss. 5 and 6. No custom of impartibility or of succession by primogeniture was proved; nor was any custom established according to which the villages would appertain to the Nawabship. It was not the intention of the parties to the Sanad of 29th January 1874, nor to the settlement of 1854 that these villages should so appertain. The intention of the Government was to create a new tenure subject to the ordinary law of inheritance, and not to reinstate Nawaz Khan in any portion of his ancestral rights; and the respondent had shown no title to eject the appellant by virtue of any sanad or grant from the British Government. The respondent was bound by his agreement with the appellant of equal partition entered into in 1882 with the sanction of the Court of Wards, such agreement being a family arrangement made to avoid litigation. By the concurrent findings of the Courts below the respondent was not entitled to possession of the village Dabarra which was given by Nawaz Khan as maintenance to his second son and belonged now exclusively to the appellant. As to this the respondent had not appealed nor filed any notice of objection under s. 561 of the Civil Procedure Code.

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Rattigah, K.C. and C. W. Arathoon for the respondent contended that the property now in dispute, was, as had been rightly held by both Courts below, acquired by the ancestors of Nawaz Khan by right of conquest, and the rights possessed by them in it were of the nature of exclusive ownership. The fact that Nawaz Khan was entitled to an hereditary claim to this property was the reason for his being restored to possession of it in 1847; the intention of the Government being to reinstate him in his ancestral rights. The property was impartible and descended by the rule of primogeniture to a single heir: the history of the family the invariable descent from the father to the eldest son, to the exclusion of the other sons. There had been no division or partition of it, and the course of judicial decision showed that in families of this kind confiscation did not interfere with the impartible nature of an estate or with its mode of devolution. Reference was made to the following authorities: *Muttu Vaduganadha Tevar v. Dorasingha Tevar*(1); *Nitr Pal Singh v. Jai Pal*

(1) (1881) 1 L. R. 3 Mad. 290, 307, 308.; L. R. 8 I. A. 99, 113 115.

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Singh(1); Elphinstone's "Cabul," 62, 66; Sir Herbert Edwards' "A Year on the Punjab Frontier," 351, 360, 369, 370, 413; Massy's "History of the Punjab Chiefs," 572; *Gunesh Dutt Singh v. Moheshur Singh*(2); *Beer Pertab Sahoe v. Rajender Pertab Sahoe*(3); *Sivagnana Tevar v. Periasami*(4); *Bhagwan Singh v. Secretary of State for India*(5); *Raja Yarlagadda Mallikarjuna v. Raja Yarlagadda Durga Prasada*(6); *Lakshmipathi v. Kandasami*(7); *Magbul Husain v. Lalla Pershad*(8); *Ram Nundun Singh v. Janki Koer*(9). As to the validity of the gift of the village Dabarra to the appellant for maintenance: *Ameeroonissa Khatoon v. Abedoonissa Khatoon*(10); *Khajooroonissa v. Rowshan Jehan*(11); Baillie's Mahomedan Law, 625; *Mogulsha v. Mahamad Saheb*(12); *Meherali v. Tajudin*(13); and the *Punjab Laws Act* (IV of 1872 as amended by Act XX of 1878), s. 6, were referred to. The respondent can contest the finding against him as to Dabarra although he has not cross appealed nor filed a notice of objection under s. 561 of the Civil Procedure Code: *Lala Gauri Sanker Lal v. Janki Pershad*(14); and *Bhagoji v. Bapuji*(15) were referred to.

De Gruyther replied.

The judgment of their Lordships was delivered by

May 15. **SIR ANDREW SCOBLE.** Shah Nawaz Khan, Nawab of Tank, died on the 10th January 1882, leaving him surviving a grandson, Ghulam Kasim Khan (the son of his elder son, Mahammad Akbar, who had predeceased him), and a son of Mahammad Afzal Khan. At the time of the Nawab's death, the grandson

(1) (1896) I. L. R. 19 All. 1, 9.
 10; L. R. 23 I. A. 147, 151.

(2) (1855) 6 Moo. I. A. 164, 187,
 190, 191.

(3) (1867) 12 Moo. I. A. 1, 29,
 33, 34, 36.

(4) (1878) I. L. R. 1 Mad. 312;
 L. R. 5 I. A. 61.

(5) (1874) L. R. 2 I. A. 38.

(6) (1900) I. L. R. 24 Mad. 147;
 L. R. 27 I. A. 151.

(7) (1892) I. L. R. 16 Mad. 54.

(8) (1901) I. L. R. 24 All. 1.

(9) (1902) I. L. R. 29 Calc. 823;
 L. R. 29 I. A. 178.

(10) (1875) 15 B. L. R. 67; L. R.
 2 I. A. 87.

(11) (1876) I. L. R. 2 Calc. 184;
 L. R. 3 I. A. 291.

(12) (1887) I. L. R. 11 Bom. 517.

(13) (1888) I. L. R. 13 Bom. 156.

(14) (1889) I. L. R. 17 Calc. 809;
 L. R. 17 I. A. 57.

(15) (1888) I. L. R. 13 Bom. 75.

was thirteen years of age, and the son about twenty-three years old. Upon their joint application, the Nawab's estate was transferred into their two names as proprietors in equal shares; but this mutation is not relied on, as Ghulam Kasim Khan was then a minor, and the Nawab having died in debt, the management of his property was undertaken by the Court of Wards.

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On the 6th October 1882, the Government of India sanctioned the appointment of Ghulam Kasim Khan, the grandson of the late Nawab, to be the successor "to the title and position of Nawab and Chief of Tánk, and also to the entire jagir and cash assignment enjoyed by the late Nawab," subject to a deduction of certain emoluments "for the maintenance of the son and the two widows left by Shah Nawaz Khan."

The young Nawab attained his majority in 1892, and the estate was released from the superintendence of the Court of Wards. His uncle thereupon claimed partition, basing his claim on the mutation proceedings, but the Revenue Court declined to enter into the question of title, and referred the parties to the Civil Court. The present suit was therefore instituted in February 1894, the respondent being plaintiff and the appellant defendant. The claim was to recover the half-share of Shah Nawaz's property entered in the defendant's name in 1882, on the ground that "according to the custom and the practice of the family" the whole of it belonged to the Chief for the time being as head of the family and by virtue of his Chiefship. The defendant, in his written statement, denied the custom, and asserted that "in matters relating to succession the parties' family has always been bound by Mahomedan law." It is now admitted that the Mahomedan law does not apply, and that the decision of the claim depends upon the custom existing in the family—that is to say, whether the estate goes with the Chiefship, as alleged by the plaintiff, or devolves according to the custom of the district, under which, the defendant asserts, the property would be divided between the son and grandson of the late Nawab in equal shares.

The District Judge found that the plaintiff had failed to prove the special custom alleged by him, and dismissed the suit. The Chief Court of the Punjab, on appeal, reversed this decision and

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gave the plaintiff a decree for possession of defendant's recorded half share in seven villages, *viz.*, (1) Tánk, (2) Hayat, (3) Budha, (4) Baloch, (5) Kaura, (6) Daggar, and (7) Rukh Ranwal. As to an eighth village, Dabarra, the Court gave the plaintiff a decree for possession, "with this proviso that the decree will not be executable if, within six months from this date, defendant renounces all claim to the allowance of Rs. 5,000 *per annum* made to him by Government out of plaintiff's grant. If he either refuses or fails to renounce such claim within such period, then plaintiff will be entitled to execute his decree." The present appeal is against both branches of this decree.

A great body of evidence, both oral and documentary, was adduced as to the history of Tánk and its rulers prior to the British annexation of the Punjab, from a consideration of which the Chief Court arrived at the following conclusions:—

"1. The country known as Tánk proper belonged to the Chief for the time being, who was both ruler and proprietor."

"2. Succession devolved upon the eldest son of the Chief, the members of his family being entitled to maintenance only."

In these conclusions their Lordships concur. The history of the Chiefs of Tánk, as shown in this Record, was marked by many vicissitudes. Originally independent they became tributary in turn to the Afghans and the Sikhs; they were sometimes in power, and sometimes in exile; but so far as the evidence extends, the succession to the Chiefship went always in the line of primogeniture, except in one instance in which the eldest son was set aside on the ground of insanity. And with the Chiefship went the ownership of the lands of the *ilaka*. As Sir John Lawrence observes, in a memorandum of 17th March 1854, "Previous to the expulsion of the father of Shah Nawaz, he was virtually the Chief and the landed proprietor of the whole of Tánk. All other classes had been reduced to complete subjection."

When the settlement of the country was made after the introduction of British rule in 1849, it was the policy of the Government to recognise the occupiers of the soil as the proprietors of their respective lands; and although Shah Nawaz Khan asserted a proprietary title, by virtue of his Chiefship, to all the villages, sixty-seven in number, which formed the Pergana of Tánk, his

claim was eventually admitted in regard to seven only, *viz.*, (1) Tánk, (2) Baloch, (3) Budha, (4) Kaura, (5) Hayat, (6) Daggarr, and (7) Dabarra. These are the villages now in dispute; the eighth, Rukh Ranwal, being a tract of grass land used for grazing horses and appurtenant to Tánk. Their Lordships agree with the Chief Court that the effect of this settlement was not to create a fresh estate subject to the ordinary law of inheritance, but to continue to the Chief for the time being, as it were *jure coronæ*, the proprietorship of the villages which had been founded by his ancestors, and the succession to which had theretofore been regulated by the custom of the family.

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This view is supported by what took place in 1875, when, as the result of considerable negotiation, the Government of India conferred upon Shah Nawaz Khan, as an hereditary jagir, a cash allowance of Rs. 25,000 *per annum*, together with the land revenue of the seven villages abovementioned, to be "held on condition of good service, and descend from the Nawab integrally to the successor in the direct male line who may be selected by the Government as most competent." In sanctioning this grant the Governor-General in Council expressly recognised that "the status accorded to the occupiers of the soil" under the Regular Settlement could not be altered, and accordingly made no change in the position in which the Nawab already stood in regard to the proprietorship of these villages, as distinguished from their liability to payment of Government revenue.

Upon the terms of this arrangement being communicated to Shah Nawaz Khan, he "expressed a wish that separate provision might be made for his younger son, Mahammad Afzal Khan, in the event of the elder son, Mahammad Akbar Khan, being selected by Government to succeed him as Nawab and Jagirdar at a future time;" and he was informed, in reply, that "he himself had always stated it to be the rule in the Katti Khel family that the head of the family should alone arrange what provision should be made for junior members. Such being the case, the authorities saw no cause to deviate from what was acknowledged by the Nawab himself to be the recognised and established custom of his house." In pursuance of this suggestion, Shah Nawaz Khan, on the 23rd June 1876, applied to the Settlement Officer that the name of his son Mahammad Afzal Khan should be entered as

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proprietor of the village of Dabarra "so that he may remain in possession of it and enjoy the whole of its produce while I will have nothing to do with the village;" and the order upon this application was "that an entry should be made according to the request of the Nawab, who in the capacity of a jagirdar will hold the village as before." The Chief Court held that under these proceedings Dabarra became "an appanage conferred on defendant as a younger son of a Chief for his subsistence, and as such he is entitled to keep it;" but the learned Judges considered that as the Government, on the death of Shah Nawaz Khan, transferred Rs. 5,000 of his allowance to the defendant, they were "entitled to call upon the defendant to elect which maintenance he will take—that provided by his father or that provided by the Government." Their Lordships can discover no ground for putting the defendant to this election; the cash allowance and the assignment of the village arise from different sources, and are independent of each other; and without expressing any opinion as to the permanency or otherwise of the alienation of Dabarra, their Lordships consider that as regards Dabarra, the conditions imposed by the decree of the Chief Court cannot be supported.

Their Lordships will humbly advise His Majesty that the decree of the Chief Court, so far as it directs that the plaintiff should receive possession of defendant's recorded half share in the villages of (1) Tānk, (2) Hayat, (3) Budha, (4) Baloch, (5) Kaura, (6) Daggar and (7) Rukh Ranwal, be confirmed and the appeal dismissed; and so far as it relates to possession of Dabarra that the appeal should be allowed and the defendant declared entitled to the benefit of the grant of the village for his maintenance made by Shah Nawaz Khan without renouncing his claim to the allowance of Rs. 5,000 *per annum* made to him by Government; and that in other respects the decree of the Chief Court should be confirmed. As the respondent has succeeded as to the greater part of his claim the appellant must pay to the respondent three-fourths of his costs of this appeal, and the respondent must pay to the appellant one-fourth of his costs thereof with the usual set-off.

Decree varied.

Solicitors for the appellant: *Chas. Rogers Sons & Russell.*

Solicitors for the respondent: *T. L. Wilson & Co.*

J. V. W.

SHRIRAM RUPRAM

v.

MADANGOPAL GOWARDHAN.

P. C.*
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May 1, 15.

[On appeal from the Court of the Judicial Commissioner,
Hyderabad Assigned Districts.]

Contract—Suit for damages for breach of contract—Non-delivery—Tender of Price—Readiness and willingness to pay without making actual tender of money—Contract Act (IX of 1872) s. 51.

In a suit for damages for breach of a contract to deliver cotton, there was evidence that the plaintiffs had called on the defendant to perform his part of the contract by giving delivery, but that he had refused to do so and had repudiated the contract. The plaintiffs proved that they were ready and willing to carry out their part of the bargain and had made preparations with the object of having the money ready to pay for the cotton on delivery :—

Held, that under s. 51 of the Contract Act (IX of 1872) they had done sufficient to entitle them to recover damages, and were not obliged to show that they made an actual tender of the money.

APPEAL from a decree (28th June 1900) of the Court of the Judicial Commissioner, Hyderabad Assigned Districts, whereby a decree (16th June 1899) of the Civil Judge, Amraoti District, was modified, and the respondents' suit decreed with costs.

The defendant, Shriram Rupram, appealed to His Majesty in Council.

The suit was brought by the respondents, Madangopal Gowardhan and others, for damages for the non-delivery to them by the appellant of 700 bojas or bales of cotton.

The defendant, a merchant and commission agent, carrying on business under the firm of Shriram Rupram, had dealings with, amongst others, certain persons trading under the name of Kasturchand Bhikamchand at Khamgaon, to whom, at the date of the contract in suit, he was under an obligation to deliver 1,050 bales of cotton which he had bought on their account. He also had

* *Present* : LORD MACNAGHTEN, LORD LINDLEY, SIR ANDREW SCOBIE, AND SIR ARTHUR WILSON.

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dealings with the plaintiffs' firm of Madangopal Gowardhan for which mutual and current accounts existed. On 15th and 16th December 1892 one Pakurdas Purohit, a broker, wired to the plaintiff's firm from Khamgaon instructing them to sell 1,000 bales of cotton at Amraoti for what is called "basant" delivery (namely, delivery during that portion of the Hindu month of Magh which corresponded with the period between the 12th and 22nd January 1893), and at the same time he wrote them a letter informing them that the 1,000 bales to be sold belonged to Kasturchand Bhikamchand who would be the sellers of the bales to the plaintiffs' firm, and the latter would be the purchasers. This position was accepted by Kasturchand Bhikamchand and plaintiffs' firm. On the receipt of the letter the latter firm sold the 1,000 bales of cotton to certain customers of their own at Rs. 59 per bale for "basant" delivery on their own account. Subsequently on 31st December 1892 Kasturchand Bhikamchand sent a "nond chithi" (a letter to register) to the defendant through Pakurdas Purohit instructing him to register the name of the plaintiffs' firm as purchasers of 700 of the 1,050 bales of cotton at Rs. 59 per bale, and thereupon the plaintiff Rampratap, accompanied by Pakurdas Purohit, saw the defendant with the "nond chithi," and the defendant on 31st December 1892 caused entries to be made in the books of his firm showing that he had sold the 700 bales to the plaintiffs at Rs. 59 per bale to be delivered between the 12th and 22nd of January 1893; and the defendant's firm at the same time credited the plaintiffs' firm with the sum of Rs. 10,500 as earnest money for the 700 bales and debited the same sum to Kasturchand Bhikamchand.

The cotton market afterwards began to rise, and on 23rd January 1893, Rs. 78 per boja was the market rate. The defendant failed to deliver the 700 bales of cotton to the plaintiffs' firm on due date, but on the 23rd January 1893, caused an entry to be made in his books crediting the plaintiffs' firm with Rs. 87-8, being the difference between Rs. 59 per bale at which the 700 bales had been sold and Rs. 59-2 per bale which was said to be the rate fixed by some pancha, or committee of traders, whose decision however has no legal effect whatever.

On 22nd January 1896, the plaintiffs brought their suit. The plaint stated that there had been money transactions and dealings between the defendant and the plaintiffs in the sale and purchase of cotton and other articles, and that for these transactions the defendant owed the plaintiffs Rs. 13,300 up to the 8th November 1893; and they also claimed interest which raised the claim to Rs. 15,500.

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The defendant in his written statement alleged that Kasturchand Bhikamchand had sold 700 bales of cotton to the plaintiffs, and the plaintiffs had purchased them; that the plaintiffs had no money to pay the earnest money on the bales; that therefore the contract was registered in the defendant's firm as a matter of pure favour; that the plaintiff had no right to sue him but might sue Kasturchand Bhikamchand, if they liked; that the plaintiffs did not come to take the goods bringing with them the amount required for purchasing the 700 bales; that the plaintiffs had no money with them during the period for delivery of the goods; and that there was therefore no necessity according to law for the defendant to deliver the goods; that the defendant was not the plaintiff's agent, but that if it be held that he was, he had done all it was necessary to do regarding the transaction; and that when the contract between Kasturchand Bhikamchand and the plaintiffs was made there was no intention to give or take delivery of the goods.

On these pleadings issues were raised on the first of which both Courts found that the defendant was liable to the plaintiff on the contract. The only other issue now material was the third: "Did the plaintiffs demand delivery of cotton and offer payment of purchase-money? If not, can they claim damages from the defendant?"

On this issue the plaintiffs gave evidence to show that they had made proper arrangements, and were prepared to pay for the 700 bales on delivery, and that they had asked for delivery on several occasions during "basant;" but they admitted that they had not actually showed the money to the defendant, though they had told him that they had the money ready. On the other hand the principal manager of the defendant's firm deposed that the plaintiffs had not asked him for delivery, but added that even if

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they had done so no delivery would have been given as they had no right to ask for delivery. On the third issue the Civil Judge held as follows :—

“Plaintiff has not proved that he demanded delivery from the defendant and showed that he had with him the necessary money. As plaintiff has failed to do this, he is, in my opinion, not entitled to get damages at the market rate. He is only entitled to get what the defendant has given him credit for in respect of the 700 bojas. As the defendant has given credit to the plaintiff for Rs. 87-8 on account of the same bojas, I think it equitable to give a decree in favour of the plaintiff for this sum.”

The plaintiffs appealed from this decision to the Court of the Judicial Commissioner, whose decision on the third issue was as follows:—

“I think it is clearly proved that plaintiffs did ask defendants whether they were going to deliver the cotton. Possibly there was no definite demand made for delivery of the cotton and no actual tender made of the money; but this is not the point in this case. Defendant's reply was not—We will deliver the cotton on your showing that you have the money ready to pay for it—but it was a denial of liability to deliver any cotton to plaintiffs—a denial of plaintiff's right to demand delivery of cotton even if plaintiffs produced the cash, and was a total repudiation of any sowda between plaintiffs and defendants, and defendants referred plaintiffs to Kasturchand Bhikamchand. . . . On the evidence I find that plaintiffs and defendants were principals in the sowda for 700 bojas, and that as defendants repudiated the bargain they must pay the loss to plaintiffs at the market rate. It is practically admitted that Rs. 78 per boja was the market rate on 28rd January 1893.”

In the result the decree of the Court of the Judicial Commissioner was for the plaintiffs for the amount claimed—Rs. 15,500 with costs.

On this appeal,

*R. Obbard* for the appellant contended that the respondents were not entitled to sue the appellant for the damages they alleged to be due to them. The contract was not one between the appellant and the respondents, but between the respondents and Kasturchand Bhikamchand. The appellant only acted as broker in the transaction, the entries in his books being made merely to accommodate the respondents. On the question raised in the third issue it was contended, assuming that there was a contract between the appellant and the respondents, that a party to a contract in order to entitle him to damages against the other

party for the breach of it, must perform or tender performance of his part of the contract; and that the tender of money must be by actual production of the money, a mere statement of his being ready and willing to pay being not sufficient. Here the respondents had not performed their part of the alleged contract, nor had they made an actual tender of the price of the goods so as to entitle them to damages.

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*W.C. Bonnerjee* and *G. Blair* for the respondents contended that it was not necessary for the respondents to make an actual tender of the price of the goods: it was sufficient that they were ready and willing to pay for them on delivery being given. Reference was made to s. 51 of the Contract Act (IX of 1872). The evidence, it was submitted, showed that they were ready to pay for the cotton, had it been delivered. The appellant, however, had refused to give delivery and had altogether repudiated the contract. Both Courts below had held that he was liable to the respondents on this contract. The decree of the Judicial Commissioner was correct and should be upheld.

*Obbard* replied.

The judgment of their Lordships was delivered by

**LORD MACNAGHTEN.** The parties to this appeal are merchants and commission agents. The respondents, who were plaintiffs, in the Court of First Instance sued the appellant for breach of contract, claiming damages for non-delivery of 700 bojas or bales of cotton, which the appellant had, as they alleged, contracted to deliver between certain dates.

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The question has been reduced to a very narrow compass by the findings of the lower Courts. Both Courts have held that the appellant came under a contractual obligation to deliver the cotton to the respondents. They differed on one point only. The Judicial Commissioner held that the respondents were entitled to damages, which he assessed at Rs. 15,500. The First Court held that the respondents were not in a position to claim damages because they had not called upon the appellant to fulfil his contract, accompanying the demand with a tender of the price. Finding, however, that the appellant had credited the respondents in his books with a small sum as representing the rise in value of

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the cotton between the date of the contract and the due date of delivery, the Judge of First Instance thought it equitable that the respondents should be paid that amount. He held them entitled to that, but to nothing more, and he ordered them to pay the costs of the suit.

The case is a little complicated, and as presented to their Lordships it was embarrassed in some measure by the criticisms of the Judicial Commissioner on the course of procedure in the Court of First Instance. But the story comes out clearly enough on reference to the entries in the appellant's own books. The only defence really set up was that those entries did not record a business transaction, as they appeared to do, but that they were made merely as a favour to the respondents, who were not able, as the appellant alleged, to find the money required to carry out a contract which they had made with one Kasturchand Bhikamchand.

It seems that the appellant had come under obligation to deliver to Kasturchand Bhikamchand 1,050 bales of cotton which he had bought on Kasturchand's account. On the 15th or 16th December 1892, the respondents received instructions from a broker by wire to sell 1,000 bales of cotton at Amraoti for "basant" delivery, that is, for delivery during that part of the Hindu month of Magh which corresponded with the period between the 12th and 22nd days of January 1893. They were afterwards informed that the 1,000 bales belonged to Kasturchand, who would be the seller. The respondents accepted the position and sold 1,000 bales of cotton accordingly to customers of their own at Rs. 59 per bale for "basant" delivery on their own account. Subsequently Kasturchand sent to the appellant a "nond chithi," that is, a "letter to register" instructing him to register the respondents as purchasers of 700 bales out of his 1,050 bales at Rs. 59 per bale. The appellant accepted these instructions and acted upon them, and made entries in his books shewing that he had sold the 700 bales to the respondents at Rs. 59 per bale for "basant" delivery. At the same time he credited the respondents with Rs. 10,500 as earnest money for the 700 bales, debiting the same to Kasturchand.

The cotton market afterwards began to rise. Evidence was adduced on this point, and the Judicial Commissioner states that

"it was practically admitted that Rs. 78 per boja was the market rate on the 23rd of January 1893." The appellant failed to make delivery, but on the 23rd of January 1893 there is an entry in his books crediting the respondents with Rs. 87-8, being the difference between Rs. 59 per bale and Rs. 59-2 per bale, which was said to be the rate fixed by a certain committee of traders. This committee does not appear to have had any authority to fix the rate as between the appellant and the respondents, or indeed to fix a rate for any business purpose whatever. The Judicial Commissioner therefore took what appears to have been admittedly the market rate per bale on the 23rd of January 1893. The entry, however, proves that the arrangement between the appellant and the respondents was a real business transaction, and it is a clear admission by the appellant of his liability to the respondents. The appellant seems at one time to have set up the defence that the transaction was a mere gambling transaction in differences. There was, however, no proof of this allegation.

As regards the ground on which the Judge of First Instance decided the case against the respondents, it is to be observed that there was evidence that the respondents called upon the appellant to carry out the bargain and that he refused to do so. It is true that no tender was actually made, but the respondents, naturally enough in view of a rising market, were ready and willing to carry out the bargain on their part, and it is proved that they made preparations with the object of having the money ready in hand. More than this they were not required to do by the Indian Contract Act, which provides, by section 51, that "when a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise."

In the result, therefore, their Lordships will humbly advise His Majesty that the appeal ought to be dismissed.

The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant : *Howard Woolley & Co.*

Solicitor for the respondents : *W. W. Box.*

J. V. W.

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P. C*

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April 28.

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v.

SECRETARY OF STATE FOR INDIA.

[ON appeal from the Court of the Judicial Commissioner,
Hyderabad Assigned Districts.]

*False imprisonment, suit for—Limitation—Limitation Act (XV of 1877), Sch. II,
Art. 19—“Imprisonment”—Release on Bail—Period from which limitation runs.*

To support an action for false imprisonment hing short of actual detention
and complete loss of freedom is sufficient.

Bird v. Jones(1) followed.

A person is not under imprisonment after his release on bail. Limitation therefore runs from the date of such release, and a suit for false imprisonment is barred (under Art. 19 of Sch. II of the Limitation Act) unless brought within one year from that date.

APPEAL from a decree (26th April 1900) of the Judicial Commissioner of the Hyderabad Assigned Districts, affirming a decree (12th April 1899) of the District Judge of Secunderabad, which decree had dismissed the appellant's suit with costs.

The plaintiff appealed to His Majesty in Council.

The suit was brought under the following circumstances:—In July 1895 one Gopal Chunder was convicted by the District Magistrate of Simla of having abetted an offence under s. 161 of the Penal Code by attempting at Simla to bribe the Record-keeper of the Indian Foreign Office to disclose to him certain official information. On 18th September 1895 the Officiating Resident at Hyderabad, through the Thagi and Dakaiti Department at Simla, applied to the District Magistrate of Simla for a warrant for the arrest of the present appellant on a charge of abetting Gopal Chunder in committing the above-mentioned offence. The appellant was then in Hyderabad. The application was granted and a warrant for the arrest of the appellant was

* *Present*: Lord Macnaghten, Lord Lindley and Sir Andrew Scoble.

(1) (1845) 7 Q. B. 742.

issued addressed to the Officiating Resident at Hyderabad. On 2nd October 1895 the warrant was, under the orders of the Resident at Hyderabad, forwarded for execution to the Superintendent of Railway Police of H. H. the Nizam's Guaranteed State Railway, who was also a Magistrate of the first class. The Superintendent endorsed the warrant for execution to a chief constable, who on 28th November 1895 arrested the appellant at Shankarpalli, one of the stations on the said Railway.

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After his arrest the appellant was taken to the Court of the District Magistrate for the said Railway, and on 30th November 1895 was released on bail, he undertaking to appear in the Court of the District Magistrate of Simla on 8th December 1895, which date was subsequently altered to the 11th December 1895. On the latter date the appellant appeared in Court and the trial was adjourned. At the desire of the appellant the Chief Court of the Punjab, by an order dated 13th January 1896, transferred the case for trial from the District Magistrate of Simla to the District Magistrate of Umballa. On 22nd January 1896 the appellant applied to the Chief Court of the Punjab to set aside the warrant of arrest and the proceedings taken in pursuance of it, on the ground (*inter alia*) that the arrest of the appellant, a native of Hyderabad, in the territories of H. H. the Nizam was illegal. On the 17th February 1896 the Chief Court rejected this application. On 6th April 1896 the trial of the appellant was continued in the Court of the District Magistrate of Umballa; the evidence for the prosecution was concluded; the accused was examined and charges framed against him. The appellant then applied for a commission to examine witnesses for the defence at Hyderabad; and an adjournment was made to the 8th June 1896.

In the meantime, on 14th May 1896, the appellant had applied for and obtained special leave to appeal to Her late Majesty in Council against the order of the Chief Court of the Punjab passed on 17th February 1896. All further proceedings in India were then stayed pending the final order in Council on the appeal.

Their Lordships of the Judicial Committee of the Privy Council gave their judgment on 7th July 1897, and were of opinion that the arrest of the appellant was not lawful, inasmuch as he had been arrested in the territories of the Nizam of

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Hyderabad for an offence not committed on the railway or in any way connected with the administration of the railway, in regard to which classes of offences alone criminal jurisdiction had been ceded to the British Government by the Nizam. In the result, by order of Her late Majesty in Council dated 3rd August 1897, it was ordered "that the said order of the Chief Court of the Punjab of 17th February 1896 be and the same is hereby reversed, and that the said warrant of 18th September 1895 be and the same is hereby cancelled, and that the proceedings thereon be and the same are hereby set aside."

The judgment of their Lordships will be found reported in *Muhammad Yusufuddin v. The Queen-Empress*, I.L.R. 25 Calc. at page 20.

Having obtained the order in Council of 3rd August 1897, the appellant sent a notice to the "Secretary to the Government of the Punjab" on behalf of the "Secretary of State in Council." This notice purported to be sent under the provisions of s. 424 of the Code of Civil Procedure, and claimed the sum of Rs. 3,81,500 "for loss and damages sustained and expenses incurred in consequence of the illegal arrest made on 28th November 1895 at a station called Shankarpalli of H. H. the Nizam's Guaranteed State Railway Company." The notice being disregarded, the appellant instituted the present suit.

The plaint was filed on 6th July 1898 in the Court of the Superintendent of Residency Bazars, Hyderabad. On 11th July 1898 it was returned to the appellant for presentation to the proper Court, as the said Court had no jurisdiction to entertain the suit. On the same date the plaint was filed in the District Court of Secunderabad, but was on 19th July 1898 returned to the appellant's pleader to be properly stamped and re-presented within two weeks from that date. It was re-presented on 20th August 1898.

The plaint recited the conviction of Gopal Chunder, the issue of the warrant of 18th September 1895, as to which it was alleged that it was issued without jurisdiction and that the charge against the plaintiff was unfounded. The endorsements in the warrant leading to the arrest of the plaintiff and his confinement for 42 hours from the 28th to 30th November 1898 were referred to; and

the proceedings before the Magistrate, the Chief Court of the Punjab and their Lordships of the Privy Council resulting in the order of 3rd August 1897 were set out. The cause of action was alleged to have arisen on the last-named date.

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On behalf of the defendant a written statement was filed in which it was denied that the plaintiff had suffered any loss or damage for which the defendant was liable, and pleaded (i) that no suit would lie against the defendant for the acts alleged to be wrongful; (ii) that the suit was barred by limitation; and (iii) that the notice given on 6th May 1898 was not good in law under the provisions of s. 424 of the Civil Procedure Code (Act XIV of 1882).

Before settlement of issue the plaintiff's pleader stated that "the suit is not for malicious prosecution or for wrongful arrest, but for the continued loss sustained by the plaintiff by the illegal arrest and the consequent proceedings held thereafter."

The District Judge was of opinion that the complaint of the Resident and the arrest of the plaintiff were not acts of state; that although the arrest was made in excess of authority given, yet the Government having defended the action of its officers had adopted their acts and was liable in damages to the plaintiff. On the question of limitations the Judge held that as the plaintiff had expressly disclaimed that the suit was one for malicious prosecution or for wrongful arrest, it could only be regarded as one for compensation for malfeasance, misfeasance, or nonfeasance independent of contract and not specially provided for by a particular Article of Schedule II, Act XV of 1867. He therefore applied Article 36 of that Schedule as fixing the period of limitation, and held that under that Article the suit was barred and dismissed it with cost. On appeal the Judicial Commissioner confirmed the finding of the District Judge that the suit was barred by limitation. He declined to hear the arguments against the Judge's finding as to the liability of the defendant, on the ground that the defendant had filed no objections under s. 561, Civil Procedure Code. In the result he dismissed the appeal with costs.

On this appeal,

Asquith K.C. and *A. Phillips* for the appellant contended that the Courts below had wrongly held the suit to be barred

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by limitation. The wrong for which the appellant claimed damages was, it was submitted, a continuing wrong. The arrest of the appellant had been held in *Muhammad Yusufuddin v. Queen-Empress*(1) to be absolutely illegal: but until that was the case and the proceedings in the criminal case were declared to be without jurisdiction there was no date from which limitation would run to bar a suit. The wrong that was done to him in the course of those proceedings, continued until the proceedings terminated in his favour, when they were set aside by the order of the Privy Council of 3rd August 1897. The appellant's cause of action consequently only arose on that date, and the suit instituted on 6th July 1898 was in time whatever article of the Limitation Act was held applicable. The Limitation Act (XV of 1877), s. 23, and Schedule I, Articles 19, 22 and 3 i, were referred to. The suit was one for damages for illegal arrest, or false imprisonment, a condition of restraint and loss of freedom which continued down to the time when it was finally decided that the arrest which commenced the restraint was unlawful. Previous to that time the liability he was under to be again arrested at any time was a condition of restraint—a want of entire freedom. The order of the Privy Council was the appellant's release from the actual condition of restraint in which he had been, as the Privy Council held unlawfully placed. His cause of action for the illegal restraint arose from that date, and the suit was not barred by any Article of the Limitation Act, as under any Article which might govern the suit the period was not less than one year. If no Article were specially applicable, the suit would be governed by Article 120, which gave a period of six years within which the suit could be brought. It was therefore not barred.

Cohen K.C. and *De Gruyther* for the respondent contended that the suit was barred by lapse of time. In the case of illegal arrest or false imprisonment the wrong only continues whilst the plaintiff is under actual physical restraint, and ceases when he is released: *Lock v. Ashton*(2). Here the appellant was released on bail 42 hours after his arrest. From that time he was no longer under restraint: he could have brought his suit at once.

(1) (1897) I. L. R. 25 Cal. 20 ;
L. R. 24 I. A. 137.

(2) (1848) 12 Q. B. 871.

His cause of action arose on his release on bail, and the suit not having been brought within one year from that date—that being the period of limitation for a suit for false imprisonment by Article 19, Schedule II of the Limitation Act—is barred. *The Queen v. Hughes*(1) was referred to. Had the suit been one for malicious prosecution, it would have been necessary to allege and prove malice and want of reasonable and probable cause. The distinction between an action for malicious prosecution and that for false imprisonment is laid down in *Austin v. Dowling* (2).

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Asquith K.C. replied.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The question in this case is a very short one. It really comes to this: Is a prisoner, who has been released on bail, under imprisonment still so long as he is out on bail? May 15.

There are no facts in dispute at this stage of the proceedings.

In July 1895 one Gopal Chunder was convicted by the District Magistrate at Simla of having attempted to obtain official information by bribery. On the 18th of September 1895 the Officiating Resident at Hyderabad applied to the District Magistrate at Simla for a warrant to arrest the appellant on the charge of having abetted Gopal Chunder in the commission of that offence. Now the appellant was and is a subject of the Nizam of Hyderabad. He was a native of that State and in the Nizam's service. The Magistrate granted the application and issued a warrant for the appellant's arrest addressed to the Officiating Resident at Hyderabad. In issuing the warrant the Magistrate recorded a note to the effect that it could only be executed out of British India through a Political Agent, and that the Resident at Hyderabad, as such Political Agent, must decide whether the accused, if in a foreign territory, could be handed over to the British Courts under the Extradition Law.

At Hyderabad the warrant was endorsed to the Superintendent of Railway Police there. He endorsed it over to a chief constable who arrested the appellant at one of the stations on the Nizam's State Railway on the 28th of November 1895. The

(1) (1879) L. R. 4 Q. B. D. 614.

(2) (1870) L. R. 5 C. P. 524.

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Railway itself is part of the Nizam's territories. But the Government of India by arrangement with the Nizam exercises jurisdiction upon the railway by a British Magistrate in respect of a certain class of offences which may be termed railway-offences.

The appellant was taken to the Court of the District Magistrate for the Railway. On the 30th of November 1895 he was released on bail, undertaking to appear on a day named at the Court of the District Magistrate at Simla. At the appellant's request the case was afterwards transferred to Umballa. There were various proceedings and adjournments. Ultimately the appellant applied to the Chief Court of the Punjab to set aside the warrant. That application was unsuccessful, but on appeal to Her late Majesty the Order of the Chief Court of the Punjab was reversed, the warrant of the 18th of September 1895 was cancelled, and the proceedings thereon were set aside by an Order in Council dated the 3rd of August 1897.

In July 1898 the appellant filed his plaint in the present suit against the Secretary of State for India, alleging that the warrant of September 1895 was issued without jurisdiction, and that the charge against him was unfounded. As compensation for the injury inflicted upon him, and the suffering, expense, and loss which he had sustained in consequence, he claimed damages to the amount of Rs. 3,81,500. The plaint stated that the cause of action arose on the 3rd of August 1897, the day of the date of Her late Majesty's order in Council.

Various defences were raised on behalf of the Secretary of State. The only one which calls for decision on the present occasion is the question of limitation.

In the Court of First Instance the cause of action was not defined with anything like precision. The pleader for the plaintiff asserted that it was neither false imprisonment nor malicious prosecution. The case as presented to the Court appears, however, to have partaken of both. In the result the Court dismissed the suit, holding it barred by limitation. An appeal to the Judicial Commissioner met with the same fate, on the ground apparently that the appellant had not satisfied the Court that "his imprisonment or restraint on bail, with surety or without surety, extended to within one year prior to the date of institution of suit."

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Before this Board the learned Counsel for the appellant raised a clear and simple issue. They admitted that no question of malicious prosecution was involved. All or almost all the elements required to found a case of malicious prosecution were wanting. It was false imprisonment or nothing. Again, they admitted that if the imprisonment ended on the 30th of November 1895, the suit was time-barred, for the period of limitation in a suit for false imprisonment is one year from the termination of the imprisonment. But their contention was that the imprisonment continued until the warrant was set aside. So long as the restraint of bail lasted—and it may be taken that it lasted until the warrant was set aside—the appellant, they said, was not a free man; he was even liable to be actually imprisoned through the action of his surety, or possibly by reason of the intervention of the Government. All this may be very true. But the learned Counsel for the appellant did not cite any case in support of their contention. The whole weight of authority is the other way. Nothing short of actual detention and complete loss of freedom will support an action for false imprisonment. The leading case on the subject is the case of *Bird v. Jones*(1) in which Coleridge, Williams and Patteson, JJ., differed from Denman, C. J. “Some confusion,” said Coleridge, J., “seems to me to arise from confounding imprisonment of the body with mere loss of freedom: it is one part of the definition of freedom to be able to go whithersoever one pleases; but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own.” Williams, J., speaks of imprisonment as being “entire restraint,” and Patteson, J., adds, “imprisonment is, as I apprehend, a total restraint of the liberty of the person for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring on him.” The old authorities cited in that case are to the same effect.

In their Lordships’ opinion it is perfectly clear that the appellant’s imprisonment did not last one moment after he was liberated on bail. The very object of granting bail was to relieve him from imprisonment. Immediately after his liberation he

(1) (1845) 7 Q. B. 742.

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might have brought a suit for false imprisonment—and possibly he might have succeeded in obtaining some damages. Having failed to bring his suit within one year from the date of his liberation, he is now barred by the law of limitation.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed.

The appellants will bear the costs of the appeal.

Appeal dismissed.

Solicitor for the appellant: *L. P. E. Pugh.*

Solicitor for the respondent: *The Solicitor, India Office.*

J. V. W.

APPELLATE CIVIL.

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DEOKI SINGH

v.

LAKSHMAN ROY.*

Land Registration—Land Registration Act (VII B.C. of 1876) ss. 42, 44, 78—Registration of share in an estate—Share in specific mouzas in an estate.

The Land Registration Act (Bengal Act VII of 1876) provides for the registration by proprietors or mortgagees of their shares in an estate, but does not make it incumbent upon them to register their shares in specific mouzas or other portions of land within the estate.

Parashmoni Dassi v. Nabokishore Lahiri (1) followed.

SECOND appeal by the plaintiffs, Deoki Singh and another.

The mortgagors of the plaintiffs and of their co-sharer defendants had their names registered as the proprietors of a three-anna

* Appeal from Appellate Decree No. 475 of 1901, against the decree of B. C. Mitter, Subordinate Judge, Saran, dated Dec. 15, 1900, reversing the decree of Pankaja Kumar Chatterjee, Munsif of Saran, dated July 27, 1900.

(1) Ante, p. 773.

share in three mouzas—Bausapali, Karant and Dhatura—comprised in a single revenue-paying estate. Then by an amicable arrangement between all the proprietors, the said mortgagors took a ten-anna share in one of the mouzas and a five-anna share in another in lieu of the said three-anna share in all the three mouzas. Thereafter they gave a *sarpeshgi* lease in respect of a moiety of their share to the plaintiffs and the other moiety to the co-sharer defendants. The plaintiffs had their names registered as mortgagees under the provisions of s. 44 of the Land Registration Act with respect to the said three-anna share in the three mouzabs. It was proved that the plaintiffs and the co-sharer defendants and their mortgagors used to recover rent from the tenant-defendants according to the terms of the amicable arrangement. The plaintiffs instituted this suit in the Court of the Munsif of Saran, for recovering arrears of rent from the tenant-defendants, who decreed the suit in favour of the plaintiffs, holding that s. 78 of the Land Registration Act was no bar to the suit; but on appeal the Subordinate Judge held that, having regard to the provisions of that section, the plaintiffs were not entitled to institute this suit.

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Babu Biraj Mohan Masumdar for the appellants.

Babu Dwarka Nath Mitter for the respondents.

PRATT AND MITRA JJ. The plaintiffs and their co-sharer defendants obtained a *sarpeshgi* lease from the proprietors, who are the registered holders of a three-anna odd share in three villages. By an amicable arrangement between all the proprietors, the plaintiffs' lessors obtained a ten-anna share in one of the villages and a five-anna share in another in lieu of the said three-anna odd share in all the three mouzabs. The plaintiffs sued for arrears of rent as for a ten-anna share in one village and five-anna in another; the suit has been dismissed on the ground that it is not maintainable under section 78 of the Land Registration Act, although the defendants have been paying rent on that basis without objection for many years.

We think that the view taken by the Subordinate Judge is not correct. The Act while providing for the registration by

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proprietors of their shares in an estate does not make it incumbent upon them to register their shares in specific mouzahs or other portions of land within the estate.

The plaintiffs as well as their lessors have been duly registered with respect to a three-anna odd share in all three mouzahs comprising the estate, and they have therefore complied with the requirements of section 42 of the Land Registration Act, and their position is not affected by the fact that under an amicable arrangement their shares have been differently allocated so as to give them larger shares in two mouzahs than their registered interest and no share at all in the third mouzah.

The same view was taken by another Division Bench of this Court in *Parashmoni Dassi v. Nabokishore Lahiri*(1).

The decree of the Lower Appellate Court is set aside, and that of the Munsif is restored with costs throughout.

S. C. B.

Appeal allowed.

(1) *Ante*, p. 773.

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March 19, 20,
23, 24, 25,
26;

April 1.

Lease, construction of—"Istemrari mokurari," meaning of—Conduct and intention of parties—Local custom—Extrinsic evidence, admissibility of—Estoppel by misrepresentation—Recognition of succession to tenancy—Relevant fact—Evidence Act (I of 1872), s. 11, cl. 2.

The words *mokurari istemrari* in a lease do not primarily imply any heritable character in the grant, as the term *mowrasi* does. They imply permanency, from which, in a secondary sense, such heritable character might be inferred, it being always doubtful whether they mean permanent during the lifetime of the grantee or permanent as regards hereditary character. The words do not *per se* convey an estate of inheritance, but such an estate can be created without the addition of any other words, the circumstances under which the lease was granted and the subsequent conduct of the parties being capable of shewing the intention with sufficient certainty to enable the Court to hold that the grant was perpetual. The rule is perfectly general and is not subject to the qualification that it is by local custom the meaning of the terms is restricted.

Lilanand Singh v. Munorunjan Singh (1), *Tulshi Pershad Singh v. Ram-narain Singh* and (2) *Agin Bindh Upadhyay v. Mohan Bikram Shah* (3) relied upon.

In such a case, no extrinsic evidence as to any assurances given by the grantor of the lease that it was intended to last for ever, is admissible, although the grantor may possibly be estopped from questioning the permanent character of the lease by reason of misrepresentation even on a point of law which is not clear and free from doubt.

Balkishen Das v. Legge (4) referred to.

When the question is whether one of a large number of leases granted by a landlord at about the same time, under similar circumstances and on similar terms, was intended to be a perpetual one, facts relating to acts and conduct of parties indicative of such intention are relevant facts only if they relate to a fairly large number of the leases, and not otherwise. But the fact that rents were received from the successors of the grantees in several instances, the names of the deceased grantees being retained in the rent receipts in which the successors, who were not recognised as *mokurari-istemraridars*, were merely described as *marfatdars*, is not relevant and cannot be taken as indicative of any such intention.

Croft v. Lumley (5) and *Kali Krishna Tagore v. Fuzle Ali Chowdhry* (6) distinguished.

* Appeal from Original Decree No. 43 of 1902, against the decree of Nepal Chandra Bose, Subordinate Judge of Hazaribagh, dated Oct. 10, 1901.

(1) (1873) 13 B. L. R. 124; L. R. I. A. Sup. Vol. 181. (4) (1899) I. L. R. 22 All. 149; L. R. 27 I. A. 58.

(2) (1885) I. L. R. 12 Calc. 117; L. R. 12 I. A. 205. (5) (1858) 6 H. L. C. 672, 713.

(3) *Ante*, p. 20. (6) (1883) I. L. R. 9 Calc. 843.

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APPEAL by Narsingh Dyal Sahu and others, defendants.

The plaintiff, Maharaja Ram Narain Singh Bahadur, sued for khas possession with mesne profits of a certain number of mouzahs situated within his zemindari, pergunnah Raj Ramgarh. The plaintiff alleged that under six registered leases of different dates in Sambat 1922 (1865-1866 A.D.), his ancestors granted these villages to Sheotahal Ram Sahu and Tribeni Pershad Sahu, ancestors of the defendants, jointly and in *mokurari istemrari*; that Sheotahal Ram Sahu died on the 9th April 1897, the other *Mokuraridar* Tribeni Pershad having predeceased him and that thereupon the aforesaid leases lapsed and the right to take direct possession of the mouzahs accrued to the plaintiff's ancestor Maharaja Nam Narain Singh Bahadur; and that the defendants having obstructed and opposed the possession of the plaintiff's ancestor, a notice was duly served on them in September 1898, requiring them to quit the mouzahs, but that they have declined to do so. It was contended that the villages were granted in *mokurari istemrari* tenable for the lives of the lessees only, and without any right to transfer them; and that there were no words in the pottahs under which the leases were created which could make them heritable, nor was such the intention of the parties to the contract.

The defendants contended that the grants were not temporary; that they created perpetual rights and were intended to be perpetual and heritable; that the words *mokurari istemrari* occurring in the leases always meant permanency and perpetuity; that they were so understood at the time of the creation of the leases; that the object of both the parties was that these settlements were not liable to resumption on the demise of the grantees; that had such not been the object, the *mokuraridars* could have no inducement to spend their capital for the improvement of the properties, as they did, and that the conduct of the plaintiff's managers and others, in receiving rents from the heirs and transferees of the *mokuraridars*, clearly showed the right to be heritable and transferable.

The pottah dated the 7th Jeyt, Sudi, 1922 Sambat, corresponding to the 31st May 1865, granted by Maharaja Ram Nath Singh, was in these terms:—

"In accordance with their application and kabulyat, *mokurari istemrari* from the Sambat year 1922 is granted to Sheotahal Ram Sahu and his brother

Tribeni Ram Sahu, inhabitants of Tekthi, pergunnah Bihia, District Shahabad, now residing in Hazaribagh, pergunnah Champa, District Hazaribagh, on an annual rent of Co.'s Rs. 135, in respect of mouzah Hubagh, 1 village, in pergunnah Jagessari, save and except *jaigir* and *birt* lands and coal mines and other subsoil rights. So the said mokuraridars will, at their pleasure, cultivate and make the said village prosperous; they will keep raiyats contented; they will construct canals, tanks, ponds, wells, &c.; and they shall pay the rent, month by month, as per specification of instalments given in the kabulyat. Besides this, they shall pay yearly for Daserah *salami* Re. 1, for Phagua *salami* Re. 1, and for Ghasti *salami* Re. 1, aggregating Co.'s Rs. 3. If they keep a single pie of the rent in arrear for three instalments, the *mokurari* shall become cancelled and revoked, in respect whereof the said mokuraridars shall not make any sort of objection; if they do, such objection shall be null and void. Losses due to vicissitudes of the seasons, drought, inundation, hailstorm and frost, costs of earthwork and of civil and criminal courts, shall be borne by the said mokuraridars. The said mokuraridars shall punctually carry out the orders of the court and of the sarkars. They shall not, in any respect, destroy, either overtly or covertly, the boundaries of the said mouzah, nor shall they allow any one to encroach thereon. If they destroy or injure the boundaries, or allow any one to encroach thereon, and if they fail to fulfil the orders of the courts and of the sarkar, the said mokuraridars shall be held responsible therefor. The said mokuraridars have not, in any respect, any power to transfer the said village; if they do, such transfer shall be null and void. I will not levy from the said mokuraridars any *abwab*, &c., besides the rent and *salami*. I have granted the village, including all woods, wells, trees and fisheries. They shall not cut down any fruit-bearing tree or one that is productive; if any fall down of itself, they shall plant another tree in the same place."

The other pottahs were in similar terms.

The Subordinate Judge held, upon a construction of the pottahs and the conduct of the parties, that the tenures created by the pottahs were grants tenable for the life of the grantees, that they were neither heritable nor transferable, that on the pleadings no question of custom and usage could arise on the suit and that no notice to quit was necessary. Accordingly he decreed the suit for possession with mesne profits.

Dr. Rash Behary Ghose (Babu Lal Mohan Das and Babu Akhoy Kumar Banerjee with him) for the appellants. I submit (i) that March 19, 20
28, 24, 25, 26.
the words *mokurari istemrari* in the pottahs *prima facie* imply heritability and permanency and that the plaintiff is not entitled to resume the land on the death of the grantees; (ii) that at any rate the circumstances under which the tenures were created and the subsequent conduct of the parties show conclusively that these tenures were meant to be permanent heritable ones when

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1903 they were created or that they have subsequently become so ;
 NARSINGH and (iii) that the tenants were entitled to a proper notice to quit
 DYAL SARD and that the notice served in this case was a bar to the plaintiff's
 v. claim for mesne profits.
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[BANERJEE J. The words *mokurari istemrari* do not imply succession but they may have acquired a local or special meaning in the locality.]

I shall contend that by a course of judicial decisions they have acquired a special meaning.

As regards my first contention, I submit that the lexicographical meaning of the term *istemrari* implies permanency and therefore heritability as well: see Richardson's Dictionary and Wilson's Glossary. One of the earliest decided cases is that of *Toolsee Nurain Sahee v. Modnurain Singh*(1) in which it was held that the permanence expressed in the words had reference only to the term of existence of the grantee. In particular cases, the lexicographical meaning of the words is restricted by local custom: see *Ameroonissa Begum v. Hetnarain Singh*(2), *Munrunjun Singh v. Lelanund Singh*(3), *Leelanund Singh v. Monorunjun Singh*(4), *Lakhu Kowar v. Roy Hari Krishna Singh*(5). The case of *Karunakar Mahati v. Niladhro Chowdhry*, (6) decided by Couch, C. J. and Hobhouse, J., laid down that the permanence implied in the words was not restricted to the life of the grantee. It is noteworthy that this case is not noticed by Sir Richard Couch in *Tulshi Pershad Singh v. Ramnarain Singh*(7), in which the Privy Council held that the words did not *per se* convey an estate of inheritance. This decision of the Privy Council can hardly be said to have concluded the matter, since it is based on the fact that the lexicographical meaning of the words was restricted by local custom. In the absence therefore of any evidence of local custom, as in the present case, I submit the leases in question should be construed as creating permanent and heritable interests. The other cases bearing on the subject are

(1) (1848) S. D. A. Rep. 752.

(2) (1853) S. D. A. Rep. 648.

(3) (1865) 3 W. R. 84.

(4) (1866) 45 W. R. 101.

(5) (1869) 8 B. L. R. (A. C.) 226;
12 W. R. 3.

(6) (1870) 5 B. L. R. 652; 14 W.
R. 107.

(7) (1835) I. L. R. 12 Calc. 117; L. R. 12 I. A. 205.

Bilasmoni Dasi v. Sheo Pershad Singh(1), *Beni Pershad Koeri v. Dudhnath Roy*(2) and *Ajib Bindh Upadhyaya v. Mohan Bikram Shah*(3). In the last case, it was not necessary to decide the question and the remarks are *obiter dicta*.

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As regards my second point, it is submitted (a) that the plaintiff was estopped by the representations of his predecessor in title from questioning the permanency of the leases, and (b) that the circumstances under which the leases were granted, the state of the law when some of the leases were granted in the year 1865, and the subsequent conduct of the parties, leave no room for doubt that the leases were intended to be permanent. As regards the first branch of this contention, I submit that it is clear on the evidence that such representations were made. It is true that oral evidence of the assurance of the grantors that the leases would last as long as the sun and the moon were to endure, would not be admissible having regard to the decision of the Privy Council in the case of *Balkishen Das v. Legge*,(4) in which the application of the rule laid down in *Lincoln v. Wright*(5) in this country is deprecated, but that would not exclude evidence of representations made by the grantors as to the meaning of the words *istemrari mokurari*: see *Earl Beauchamp v. Winn*,(6) *Cooper v. Phibbs*(7) and Ewart on Estoppel, p. 72. As to the second branch of the contention, see *Thumbusawmy Moodelly v. Hossain Rowthen*,(8) *Ramasami Sastrigal v. Samiyappanayakan*(9) and Elphinstone and Clark on the Interpretation of Deeds, p. 63.

[BANERJEE J. The evidence is, that all these leases were copied from one draft which was made sometime in 1862.]

There is also the circumstance that about 600 leases were granted at or about the same time in lieu of *ticca* leases and that bonuses were taken. No steps had hitherto been taken to resume any lands after the death of any of the grantees. Large sums of money have been spent by the *mokuraridars* in making

- (1) (1882) I. L. R. 8 Calc. 664;
L. R. 9 I. A. 33.
- (2) (1899) I. L. R., 27 Calc. 156;
L. R. 26 I. A. 216.
- (3) Ante, p. 20.
- (4) (1899) I. L. R. 22 All. 140;
L. R. 27 I. A., 58.

- (5) (1859. 4 De G. & J. 16.
- (6) (1878) L. R. 6 H. L. 223.
- (7) (1867) L. R. 2 H. L. 140, 170.
- (8) (1875) I. L. R. 1 Mad. 1;
L. R. 2 I. A. 241.
- (9) (1881) I. L. R. 4 Mad. 179.

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improvements. In some instances there has been recognition of the successors of the grantees. Receipts of rent from the successors in some instances have been proved: see *Kali Krishna Tagore v. Fuzle Ali Chowdhry*(1). Besides, the fact of the leases having been granted in the names of two persons jointly is significant. Why should that have been the case unless the leases were intended to be heritable? As to the provisions for forfeiture and restraint against alienation contained in the leases, they make no difference: see Act I of 1879 (B.C.), ss. 31, 88; *Jan Ali Chowdhry v. Nittgenund Bose*(2), *Mothooramohun Pal Chowdhry v. Ram Lall Bose*(3), *Mahomed Ameer v. Peryag Singh*(4), *Duli Chand v. Rajkissore*(5), and *Golak Nath Roy Chowdhry v. Mathura Nath Roy Chowdhry*(6).

The Advocate-General (Mr. J. T. Woodroffe) with him *Babus Basanta Kumar Bose, Karuna Sindhu Muk-rjee* and *Charu Chandra Ghose* for the respondent. As regards the last point raised by the appellants, I submit that no notice to quit was necessary and that the notice to quit was served as a matter of extra caution.

As to the first point raised by the other side, regard must be had to the current of decisions and legislative enactments that existed before the leases. It would appear from them that the term *istemrari*, though lexicographically it might imply permanency, does not imply any heritable character in the grant, the permanency being limited to the lives of the grantees. The following authorities were cited: Regulation VIII of 1793, ss. 16, 17, 18, 19, 49; Regulation I of 1815, Preamble; S. D. A. Select Reports, Vol. I, p. 140; *To-lare Nurain Sahee v. Modnurain Singh*(7), and the earlier precedents cited therein, *Ameeroonissa Begum v. Hetnarain Singh*(8), *Government of Bengal v. Jafur Hossain Khan*(9), *Modenarain Singh v. Kant Lall*(10), *Sorobur Singh v. Mahendranarain Singh*(11), *Gopal Lall*

(1) (1883) I. L. R. 9 Calc. 843.

(2) (1868) 10 W. R. (F. B.) 12.

(3) (1879) 4. C. L. R. 469.

(4) (1881) I. L. R. 7 Calc. 566.

(5) (1882) I. L. R. 9 Calc. 88.

(6) (1891) I. L. R. 20 Calc. 273.

(7) (1848) S. D. A. Rep. 752.

(8) (1853) S. D. A. Rep. 648, 654.

(9) (1854) 5. Mos. I. A. 467, 473,
495, 498.

(10) (1859) S. D. A. Rep. 1572.

(11) (1860) S. D. A. Rep. 577.

Tagore v. Tilluck Chunder Rai(1), *Munrunjun Singh v. Lelanund Singh*(2), *Leelanund Singh v. Monorunjun Singh*(3), *Dhunput Singh v. Gooman Singh*(4), and the unreported judgment of Roberts and Jackson, JJ., cited therein, *Satyasaran Ghosal v. Mahesh Chandra Mitter*(5), *Lakhu Kowar v. Roy Hari Krishna Singh*(6), *Karunakar Mahati v. Niladhro Chowdhry*(7), *Lilanand Singh v. Munorunjun Singh*(8), *Lakhraj Roy v. Kunhya Singh*(9), *Namnarain Singh v. Amir Khan*(10), *Sheo Pershad Singh v. Kally Dass Singh*(11), *Bilasmoni Dasi v. Sheo Pershad Singh*(12), *Tulshi Pershad Singh v. Ramnarain Singh*(13), *Parmeswar Pertab Singh v. Padmanand Singh* (14), *Beni Pershad Koeri v. Dudhnath Roy*(15) and *Agin Bindh Upadhya v. Mohan Bikram Shah*(16).

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I submit that it is quite clear from these authorities, that the permanence expressed in these words could only refer to the existence of the grantees. As to whether the meaning of the words should be regulated by the case of *Munrunjun Singh v. Lelanund Singh*(2) decided in the year of the leases: see Beale's Cardinal Rules of Interpretation, p. 160. The lease is full of conditions and restrictions. What is the cumulative effect of all these restrictions? It is said that the grantor gave certain assurances. Assuming that he did, no relief can be granted upon misrepresentation of law, for two reasons: (i) everybody is supposed to know the law and (ii) nobody should depend upon what another asserts to be the law: see *Gurulingaswami v. Ramalakshamma*(17). As to receipt of rent from successors of grantees the case of *Kali Krishna*

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| (1) (1865) 3 W. R. (P. C.) 1;
10 Moo. I. A. 183. | (9) (1877) I. L. R. 3 Calc. 210;
L. R. 4 I. A. 223. |
| (2) (1865) 3 W. R. 84. | (10) (1877) Unreported. |
| (3) (1866) 5 W. R. 101. | (11) (1879) I. L. R. 5 Calc. 543;
5 C. L. R. 138. |
| (4) (1867) 9 W. R. (P. C.) 3;
11 Moo. I. A. 433, 463. | (12) (1881) I. L. R. 8 Calc. 664;
L. R. 9 I. A. 33. |
| (5) (1869) 2 B. L. R. (P. C.) 23;
12 Moo. I. A. 263. | (13) (1885) I. L. R. 12 Calc. 117;
L. R. 12 I. A. 205. |
| (6) (1869) 3 B. L. R. (A. C.) 226;
12 W. R. 3. | (14) (1887) I. L. R. 15 Calc. 342. |
| (7) (1870) 5 B. L. R. 652;
14 W. R. 107. | (15) (1899) I. L. R. 27 Calc. 156;
L. R. 26 I. A. 216. |
| (8) (1873) 13 B. L. R. 124;
L. R. I. A. Sup. Vol. 181. | (16) Ante, p. 20. |
| | (17) (1894) I. L. R. 18 Mad. 53. |

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Tagore v. Fuzle Ali Chowdhry(1) is distinguishable. There the question was whether there had been waiver of forfeiture by acceptance of rent: see also *Rasamoy Purkait v. Srinath Moyra*(2). There is no evidence of any subsequent conduct on our part amounting to recognition, and subsequent conduct with regard to other leases is irrelevant. [Banerjee J. See section 11 of the Evidence Act.] The conduct of both parties is consistent only with the grants having been estates for life only.

Dr. Rash Behary Ghose, in reply, referred to Foa's Law of Landlord and Tenant, 2nd Edition, pp. 282—284; Platt on Leases, Vol. II, p. 234.

Cur. adv. vult.

April 1.

BANERJEE AND GHIDY JJ. This appeal arises out of a suit brought by the plaintiff-respondent, Maharaja Ram Narain Singh Bahadur, to recover direct possession of certain mouzahs or villages, on the allegation that the plaintiff is the zemindar proprietor of these mouzahs; that they were granted by, or with the sanction of, the plaintiff's predecessor, Maharaja Ram Nath Singh Bahadur, to Sheotahal Ram Sahu and Tribeni Pershad Sahu, the ancestors of the defendants, in *mokurari istemrari* right for the lives of the grantees by six leases granted on various dates from the 7th *Jeth*, Sudi, to the 4th *Kartik*, Badi 1922, corresponding to certain dates from May to October 1855; that on the death of Sheotahal Ram Sahu, the surviving grantee, who died in *Chey* 1954, the *mokurari istemrari* leases came to an end, and the plaintiff who became entitled to possession, posted his employés in the mouzahs, but as the defendants did not give up possession, the plaintiff gave them six months' notice, requiring them to vacate from the beginning of 1956; and that as the defendants are still in possession, the plaintiff is obliged to bring this suit.

The defence, in substance, was that the *mokurari istemrari* leases created permanent and heritable rights in the grantees; that the plaintiff and his predecessors by their acts and conduct recognized these leases as creating such rights; that the defendants were accordingly entitled to retain possession of the mouzahs;

(1) (1883) I. L. R. 9 Calc. 843.

(2) (1902) 7. C. W. N. 132.

and that the suit could not in any event proceed, as no valid notice to quit had been served.

Upon these pleadings the Court below framed several issues, of which we may, for the purposes of this appeal, notice only the following :—

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(i) “Were the leases granting the villages in suit to Sheotahal Ram and Tribeni Pershad for life only, or did they create any heritable interests ?

(ii) What would be the effect of the leases granting the villages in question to Tribeni and Sheotahal Ram, having regard to any local usage ?

(iii) Was notice to quit necessary ? If so, can the suit proceed ?

(iv) Did the plaintiff’s father accept and recognize the defendants as *mokuraridars* ? If so, can the plaintiff’s suit be maintained ? ”

Both parties went into evidence at considerable length on these issues, and the Court below has decided all the issues in favour of the plaintiff and given him a decree.

Against that decree the defendants have preferred this appeal, and the points raised for determination by their contentions are—

First, whether the Court below is right in holding that the terms *mokurari istemrari* do not imply the creation of a permanent and heritable right, when there was no evidence to show that their lexicographical meaning has been restricted in any way by local usage ;

Second, whether the Court below ought not to have held that the plaintiff was estopped by the assurances given by the grantor from denying the permanent and heritable nature of the leases ;

Third, whether the circumstances under which the leases were granted and the subsequent conduct of the parties did not show that the leases were intended to be perpetual ; and

Fourth, whether a previous notice to quit was necessary for the maintenance of the suit, and if so, whether the notice served in this case was a bar to the claim for mesne profits for Sambat 1955.

On the first point, the appellants’ contention is that the term “*istemrari*” implies permanency, and therefore a heritable character in the grant, as is shown in Richardson’s Dictionary

1903 and Wilson's Glossary, referred to in the case of *Leelanund Singh*
 NARSINGH v. *Monorunjun Singh*(1), and that the restriction put upon the
 DYAL SAHU above meaning is the result of local custom, as has been shown
 v. in the case of *Ameeroonnissa Begum v. Hetnarain Singh*(2),
 RAM NARAIN and that, in the absence of any evidence of any local custom,
 SINGH. the leases should be held to create a permanent and heritable
 interest.

On the other hand, it is argued for the respondent that the term "*istemrari*," though it implies permanency, does not imply any heritable character in the grant, the permanency being limited to the life of the grantees; and that this is the view taken in the case of *Tulshi Pershad Singh v. Ram Narain Singh*(3).

As the point is, in our opinion, concluded by the Privy Council decision in the last-mentioned case, we do not think it necessary to examine in detail the earlier authorities which Dr. Rash Behary Ghose for the appellants and the learned Advocate-General for the respondent have so fully and elaborately discussed in their arguments. It will be enough to say that the words *mokurari istemrari* do not in their lexicographical sense primarily imply any heritable character in the grant, as the term *motcrasi* does; but that they imply permanency from which, in a secondary sense, such heritable character might be inferred, it being always doubtful whether, to use the language of the Judicial Committee in its judgment in the case of *Lilalanand Singh v. Munorunjun Singh*(4) on 'appeal from the Calcutta High Court, they mean "permanent during the lifetime of the persons to whom they were granted, or permanent as regards hereditary character"—a doubt which Sir Richard Couch, in delivering the judgment of the same tribunal in the case of *Tulshi Pershad Singh v. Ram Narain Singh*(3) says "is not removed by the lexicographical meaning of the words." The rule laid down as to the meaning and effect of these two words is thus stated by the Judicial Committee in the last-mentioned case:—"After the review of the decisions their Lordships think it established that

(1) (1866) 5 W.R. 101.

(3) (1885) I. L. R. 12 Calc. 117;
L. R. 12 I. A. 205.

(2) (1858) S. D. A. Rep. 643.

(4) (1878) 13 B. L. R. 124;
L. R. I. A. Sup. Vol. 181.

the words *istemrari mokurari* in the pattah do not *per se* convey an estate of inheritance, but they do not accept the decisions as establishing that such an estate cannot be created without the addition of the other words that are mentioned, as the Judges do not seem to have had in their minds that the other terms of the instrument, the circumstances under which it was made or the subsequent conduct of the parties might show the intention with sufficient certainty to enable the Court to pronounce that the grant was perpetual."

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The learned Vakil for the appellants contends that this must be taken subject to the qualification that it is by local custom that the meaning of the words is restricted, as is shown by the judgment in the case of *Ameeroonnissa Begum v. Hetnarain Singh*(1), an extract from which is quoted in the judgment of the Privy Council in the last-mentioned case.

We are unable to accept this contention as correct, because their Lordships not only referred to that case, but they referred also to another case in the Sudder Dewany Reports for 1860 and quoted a passage from it which lays down the rule quite generally; and their own statement of the rule is in equally general terms, subject, of course, to the qualification about surrounding circumstances and conduct of parties being sufficient to supply the absence of words of inheritance.

We may add that the view we take is in accordance with that taken by this Court in the case of *Agin Bindh Upadhya v. Mohan Bikram Shah*(2).

The first point raised must, therefore, be decided against the appellants, and we must now consider the second and third points raised in the appeal.

Upon the second point the learned vakil for the appellants very properly conceded that having regard to the enactment of section 92 of the Indian Evidence Act, and the decision of the Privy Council in the case of *Balkishen Das v. Legge*(3), it was no longer open to him to contend on the authority of *Lincoln v. Wright*(4) that the evidence as to the assurances given by the grantors of the

(1) (1853) S. D. A. Rep. 648.

(3) (1899) I. L. R. 22 All. 149 :

(2) Ante p. 20.

L. R. 27 I. A. 58.

(4) (1859) 4 DeG. & J. 16.

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leases that they were intended to last as long as the sun and moon should endure, would be admissible; but he urged that although that was so, the plaintiff was estopped by the representations of his predecessor from questioning the permanent character of the lease. While admitting that the construction of a document was a matter of law and that there can be no estoppel by reason of misrepresentation on a point of law, the learned vakil for the appellants contended that the rule could only be applicable to cases where the misrepresentation or mistake related to a point of law that was clear and free from doubt, and did not apply to doubtful questions where the proper rule would be to hold that the grantor was estopped by his representation; and, in support of this argument, he referred to the observation of Lord Chelmsford in the case of *Beauchamp v. Winn*(1) and to the remarks of Lord Westbury in *Cooper v. Phibbs*(2). We should have been inclined to give effect to this contention if the evidence as to the assurances of the grant had been reliable; but that evidence has been disbelieved by the Court below, and we see no good reason for coming to a different conclusion. It is for the most part the evidence of interested witnesses, who are in possession of tenures similar to those now in dispute. It is contradicted by the evidence on the other side, which is, at least, as good. And it is improbable on the face of it, because, if the grantee gave that assurance, there is no reason why it should not have been embodied in the document; and it is extremely unlikely that none of the 600 grantees, who are said to have taken leases of the character of those now before us at about the same time, should have insisted upon words of inheritance being inserted in the leases.

We come now to the third point raised in the appeal. It is contended that the circumstances under which the leases were executed and the subsequent conduct of the parties, show that the leases were intended to be permanent. Among the circumstances relied upon are (i) the state of the law as laid down in the case of *Munrunjun Singh v. Lelanund Singh*(3), decided in June 1865, in which it was held that the terms *mokurari istemrari*

(1) (1873) L. R. 6 H. L. 223.

(2) (1867) L. R. 2 H. L. 149, 170.

(3) (1865) 3 W. R. 84.

imply perpetuity and (ii) the fact of the grantor having granted the leases in dispute along with similar 600 other leases in lieu of *ticca* or temporary leases with a view to induce the lessees to improve their land.

Under the head of conduct of the parties are noticed (a) the omission to resume land covered by any of the 600 leases after the death of the lessees, (b) the recognition of the successors of the grantees by receipt of rent and institution of suits.

We shall consider these matters separately and in the order in which they have been stated above.

It is argued that as some of the leases in dispute were executed after June 1865, the date of the decision of the case of *Munrunjun Singh v. Lelanund Singh*(1), in which the words *mokurari istemrari* were held to imply perpetuity, these leases at any rate, should be held to be perpetual, as the parties must be taken to have entered into the transactions in view of that being the meaning of the words; and in support of this argument, the cases of *Thumbusawmy Moodelly v. Hossain Rowthen*(2), and *Ramasami Sastrigal v. Samiyappanayakan*(3), and Elphinstone on the Interpretation of Deeds, page 63 (where certain English cases attaching weight to the practice of conveyancers are cited) are relied upon. We are unable to accept this argument as correct in this case. The case of *Munrunjun Singh v. Lelanund Singh*(1) was opposed to the previous uniform current of decisions, and was a case of a peculiar nature, as it related to *ghatwali* tenures. Moreover, the leases were made from one draft (see the deposition of Radhika Das, whom the court below has believed and whom we see no reasons to disbelieve); and that draft must have been prepared before June 1865. Then again there was hardly any practice of conveyancers here such as the English cases contemplate; and if there was any, that must have been in accordance with the previous current of decisions the other way. Nor can we attach much weight to the second circumstance mentioned above, as indicating an intention to create perpetual leases. The former practice was to grant *ticca* leases for short terms, and as against that, this grant of

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(1) (1865) 3 W. R. 84.

(2) (1875) I. L. R. 1 Mad. 1; L. R. 2 I. A. 241.

(3) (1881) I. L. R. 4 Mad. 179.

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leases for the lives of the grantees might well be taken to have been sufficiently acceptable to them. As for the evidence given that the improvements cost large sums, it is wholly insufficient and unreliable, no accounts having been produced by any witness, and no good reason being given for their non-production.

Then, as to the subsequent conduct of the parties, we should observe that no recognition of any successors of the grantees, nor anything else indicative of the intention of the grantor, has been shown as to the leases in dispute. The only thing shown with reference to these leases is that in a usufructuary mortgage (exhibit A) executed by the plaintiff's predecessor, when one of the lessees was alive, the villages covered by some of the leases were mortgaged, and the rent reserved in the leases was treated as the income to be realized by the mortgagee; and no change was made in the terms of the mortgage after the death of the surviving lessee, although, upon the plaintiff's case, the mortgagor become entitled to treat the actual assets of the village as his. This omission, however, cannot amount to any recognition of the continuance of the leases from which the intention that they were to be perpetual could be fairly inferred. The instances of alleged recognition of the successors of the grantees that have been adduced relate to other leases; and the argument is that as all the 600 leases were granted at or about the same time under similar circumstances and on similar terms, acts and conduct of the parties indicative of an intention that any one of these leases was perpetual, should be evidence of a similar intention with regard to all the other leases. But we are unable to accept this argument as correct in its broad generality. Of course, if it had been shown that in the case of a fairly large number of these 600 leases, there was recognition of the successors of the original grantees, and such recognition was not explained by the other side as being the result of anything peculiar to the leases to which the recognition related, the fact that the intention indicated by the acts and conduct of the parties was to make those leases perpetual would make it highly probable that the same was the intention with regard to the leases now in dispute, and the facts relating to these leases would, therefore, have been relevant facts, under clause 2 of section 11 of the Indian

Evidence Act. But then, have we such a fairly large number of instances proved, and have not the instances so far as they have been proved, been explained as being either insufficient or as being the result of peculiarities in the circumstances of the leases to which they belong?

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We are of opinion that both these questions should be answered in favour of the respondent. As the circumstances have been considered sufficiently in detail by the Court below and as we agree in the view taken by that Court, upon this part of the case, we do not think it necessary to discuss the matter in detail. It will be enough to say that in many of the instances given, the so-called recognition has been made, not by the Raja himself, but by his agents, whose powers were, moreover, expressly limited: see Exhibit XII, paragraphs 5 and 7, with regard to the powers of Mr. Bowman, Exhibit XVII, paragraph 7, with regard to the powers of Sheonarain Lal, and Exhibit XVII, paragraph 2, with regard to the powers of Ghansham Das. Then again, in several of the instances, such as those of suits brought (see plaint, Exhibit $\frac{x}{12}$ and petition, Exhibit $\frac{x}{13}$), they were filed at a time when one of the grantees was alive, while as to the plaint, Exhibit XX, it relates to an exceptional case, as will appear from Exhibit XV, in which it is said that the plaintiff having taken pity on the defendant owing to his being a minor and an orphan, waived his claim to resume the lease.

We are therefore of opinion that these instances of so-called recognition are not sufficient to indicate any intention that the leases should be perpetual.

Then it is argued that rent was received from the successors of the grantees in several instances. If that was so, the receipts given show that these successors were never recognized as *mokurari istemrardars*, or as tenants. In the place of the names of the tenants, the old names were still retained, that is, the names of the grantees, and the parties paying the rent were entered as *marfatdars*. Such receipts of rent can hardly be said to imply an intention that the leases were intended to be heritable, when the persistently expressed intention was that the successors were not to be recognized as holders of the leases. It was argued that the mere receipt of rent, even though under

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protest, would amount to a waiver of the lessor's right, to resume the property leased, and in support of this contention the case of *Croft v. Lumley*(1) and *Kalikrishna Tagore v. Fuzle Ali Chowdhry*(2) were relied upon. Those cases are distinguishable from the present. They were cases of forfeiture, and the question was whether receipt of rent after a breach of the covenant upon which forfeiture was to follow, did not amount to waiver of forfeiture, notwithstanding that the rent was received subject to qualification, and the question was answered in favour of the tenant. That was evidently because the law does not favour forfeiture. Here, however, the question is not one of forfeiture. What the defendants have got to prove is, that there were such acts and conduct as indicated an original intention that the leases were perpetual and heritable, and it would be impossible to hold that the receipts for rent in the form given in the present case indicated any such intention. The intention as appearing on the face of the receipts given was the very reverse, namely, the intention not to recognize the successors of the grantees as holders of the tenure. We must therefore hold that nothing has been shown from the circumstances under which the leases were granted, or the subsequent conduct of the parties, to indicate that the leases were intended to be perpetual. On the contrary, it is abundantly clear from the circumstances under which the leases were granted, and the subsequent conduct of the parties, that the leases could not have been intended to create any hereditary right, and this we shall shortly show. On the face of the leases it appears that the lessees were not to have any power to transfer their tenancy, and it is provided that if they did so, such transfer should be null and void.

Then, again, it is provided that the lessees shall not cut down any fruit-bearing or profit-yielding trees, and if any fall down of itself, the lessees shall plant another tree in the same place. It further provides that if the lessees keep a single pie of the rent in arrear for three instalments, the lease shall come to an end.

Then, again, we find that most of the leases, if not all,* were granted in the names of two persons. Why should that be,

(1) (1858) 6 H. L. C. 672, 713.

(2) (1883) 1. L. R. 9 Calc. 843.

* Sir W. W. Hunter's Statistical Account of Bengal, Vol. XVI, p. 123.

if the leases were intended to be permanent and heritable? The evidence on the side of the defendants is far from furnishing any explanation; while the evidence on the other side furnishes a clear explanation consistent with the case of the plaintiff that the leases were intended to last only for the life-time of the grantees. The grantees wanted to secure as long a duration for the leases as they well could; and they accordingly insisted upon the leases being granted in two names to last during the life-time of the longer liver of the two. In that way they, to a certain extent, diminished the risk of the leases being terminated with the life of one; and what is most significant, we find instances in which the two names are the names of father and son, or grandfather and grandson. Why should that have been the case if the leases were intended to be heritable? There is another circumstance appearing in the evidence, which is not without significance, namely, that, whereas leases which were admittedly of a permanent and heritable character had the *nasarana* or bonus paid entered in them, in the case of the leases in dispute and of the other 600 leases connected with these, the *nasarana* paid was deliberately omitted to be mentioned. So much for the circumstances under which the leases were granted which are adverse to the plaintiff's contention.

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Then with regard to the acts and conduct of the parties, there is not a single instance given of the successors of the grantees in any case seeking for or insisting upon the registration of their names in place of those of the original grantees, and it is admitted that no transfers have been registered, and that the Maharaja refused to register any transfer.

That being so, we must hold that there has been nothing shown in the circumstances under which the leases were granted or the subsequent conduct of the parties from which it could be inferred that the leases were intended to be perpetual.

It remains now to notice the fourth and last point raised in the case, namely, whether any notice was necessary for the maintenance of the suit, and, if so, whether the notice given was not a bar to the claim for mesne profits for 1955 Sambat. Of course, if a notice was necessary, the terms of the notice would lend support to the contention that the claim for the mesne

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profit for 1955 was not maintainable. But we are of opinion that no notice was necessary for the maintenance of the suit ; and the terms of the notice go to show that though notice was given, the plaintiff did not admit that such notice was necessary. The notice states that although the leases came to an end upon the death of Sheotahal Ram Sahu, the last of the lessees, and the mauzas were brought under resumption, the defendants, without any reason, refuse to give up possession, and the notice was given evidently with a view to remove any possible objection that might be made. In the view we have taken of the nature of the leases we do not think that any notice was necessary for the maintenance of the suit. In that view of the case there can be no objection to the plaintiff's recovering mesne profits for 1955. The result is that the points for determination must be decided in favour of the respondent and this appeal dismissed with costs.

M. N. R.

Appeal dismissed.

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June 12.

Co-sharers—Building, right to removal of—Discretion of Court—Judgment, contents of.

Where several parties are joint owners of land and one of them erects a wall upon the land without the consent of his co-sharers, the Court should not interfere to order the demolition of the wall when there is no evidence to shew that injury has been done to the party complaining and that reasonable steps were taken in time to prevent the erection of the wall.

Najju Khan v. Imtiazuddin(1) dissented from. *Nocury Lall Chuckerbutty v. Bindabun Chunder Chuckerbutty*(2), *Shamnugger Jute Factory Co. v. Ram Narain Chatterjee*(3) and *Joy Chunder Rukhit v. Bippro Churn Rukhit*(4) followed.

In a suit like the present it is of the utmost importance that the decree should state the precise nature of the relief granted.

SECOND appeal by defendant No. 1, Bibi Fazilatunnessa.

The plaintiffs and the defendants are the co-owners of mouza Rasulpore Fateh, and have their respective dwelling-houses on the said land, separate portions of which were in their individual occupation by mutual consent as the *ramna* or compound of their houses. A few months previous to the institution of the suit, defendant No. 1 erected a wall upon a portion of this *ramna* in her occupation. The plaintiffs alleged that the erection of the wall obstructed the passage for “egress and ingress to the mosque, *imambara* and dwelling-house.” But there was no clear finding on this point by the Lower Appellate Court, and there was no suggestion that the defendant No. 1 had been warned not to erect the wall. In the plaint the plaintiffs prayed as follows:—

“(1) That it may be adjudicated that the *ramna*, which is attached to the house of both the parties and which is about 3 bighas 6 cottas

* Appeal from Appellate Decree No. 1423 of 1900, against the decree of A. E. Staley, District Judge of Mozufferpore, dated May 3, 1900, affirming the decree of Mahmood Hasan, Munsif of Mozufferpore, dated Jan. 9, 1900.

(1) (1895) I. L. R. 18 All. 115.

(3) (1886) I. L. R. 14 Calc. 189.

(2) (1882) I. L. R. 8 Calc. 708.

(4) (1886) I. L. R. 14 Calc. 236.

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16 dhurs, and the boundaries whereof are given in schedule I of the plaint, is *ijmali* (joint); that the plaintiffs have the right to use the aforesaid *ramna* that, in like manner, the house of Mussammat Mitho, together with about 1 cotta of land appertaining thereto, as bounded below in schedule No. 2, is also *ijmali* (joint), and that it is not the exclusive property of the defendants 1st party.

- (2) That, for the convenience of both the parties, a direction may be given for the use of the *ramna* by each party, and that it may be further ordered that no party should use the *ramna* in such a way as to do mischief and injury to another party.
- (3) That the defendant, 1st party may be stopped from raising a new wall in the *ijmali ramna* land; that the brick wall, 56 feet long, and the mud wall, 132 feet long, and each 2 feet broad, as per boundaries given below in schedule No. 3, so far as the walls have already been constructed and are being constructed and will be constructed and will be constructed hereafter may be demolished, and removed; that the expenses incurred in demolishing the wall and levelling the ground may be taken from the plaintiffs, and that a decree for so much amount with interest thereon may be passed against the defendant 1st party.
- (4) That if the Court, having regard to the convenience (of the parties), their possession and their use of the *ramna* land and *sakan*, considers partition thereof necessary, the Court may separate the *ramna* land to the extent of 8 annas, the share of the plaintiffs by effecting partition thereof and fixing the boundary limits thereof.
- (5) That other reliefs to which the plaintiffs may be entitled may also be granted to the plaintiffs.
- (6) That the costs in Court may be awarded against the defendant 1st party."

The Munsif after setting forth in the decree the reliefs asked for in the plaint ordered that the suit be decreed with costs, without stating the precise nature of the relief granted, and the District Judge affirmed on appeal the decree of the Munsif.

*Mr. O'Kinealy, Babu Umakali Mukerji and Syed Mahomed Tahir* for the appellants.

*Dr. Ashutosh Mukerji, Babu Jnanendra Nath Bose and Babu Joy Gopal Ghose* for the respondents.

**PRATT AND MITRA JJ.** The facts found in this case are as follows:—Plaintiffs and their aunt, the defendant No. 1, are co-owners of mouza Rasulpore Fateh, and have their respective houses upon the land, and they occupy separate portions of the



*ramna* or compound by mutual permission and for their individual convenience. A few months before suit the defendant erected a wall upon a portion of the compound in her occupation, and this the learned Judge held that she had no right to do, as it operated to restrain the plaintiffs from passing over the land so built over, and therefore he thought they were entitled to have the wall demolished, even though it caused them no damage.

Though the view thus expressed by the learned Judge may perhaps be justified by the case of *Najju Khan v. Imtiazuddin*(1), it is not consistent with the decisions of this Court as expressed in a number of cases, of which we think it sufficient to cite only the three following. In *Nocury Lall Chuckerbutty v. Brindabun Chunder Chuckerbutty*(2), it was held as follows :— “There is a considerable difference between a case in which the other co-sharers, acting with diligent watchfulness of their rights, seek by an injunction to prevent the erection of a permanent building and a case in which, after a permanent building has been erected at considerable expense, he seeks to have that building removed. In a case such as that last mentioned the principle which seems to have been settled by the decisions of this Court is this that though the Court has a discretion to interfere and direct the removal of the building, this is not a discretion which must necessarily be exercised in every case; and as a rule it will not be exercised unless the plaintiff is able to show that injury has accrued to him by reason of the erection of the building, and perhaps further that he took reasonable steps in time to prevent the erection.” In the case of *Shamnugger Jute Factory Co. v. Ram Narain Chatterjee*(3), it was laid down that there is no such broad proposition as that one co-owner is entitled to an injunction restraining another co-owner from exceeding his rights absolutely and without reference to the amount of damage to be sustained by the one side or the other from the granting or withholding of the injunction. That case was cited and expressly followed in *Joy Chunder Rukhit v. Bippro Churn Rukhit* (4).

In the case before us there appears to be no suggestion that the defendant had been warned not to build the wall. No specific

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(1) (1895) I. L. R. 18 All. 115.

(2) (1882) I. L. R. 8 Calc. 708.

(3) (1886) I. L. R. 14 Calc. 189.

(4) (1886) I. L. R. 14 Calc. 236.

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injury to the plaintiffs has been found in the judgment of the learned Judge. In the plaint it was stated that the site of the wall was used as a passage for egress and ingress to the mosque, *imambara* and dwelling-house. Issue No. 6 expressly raises the question of obstruction to the plaintiffs' right-of-way. The Munsif states in his judgment that the evidence on behalf of the plaintiffs was that they used to go to the mosque and *imambara* over the land where the wall has been erected, and that the defendant's pleader contested the question with so little force that the Munsif considered he had fallen in with his own view, that this part of his case was weak and indefensible. Possibly the appellant did not contest the Munsif's finding on this point in the Appellate Court. However that may be, it is necessary for the Judge to consider the matter. Even if he thinks that the plaintiffs had a way of necessity which has been obstructed, still it may not be necessary to remove the whole of the wall in order to afford the plaintiffs a convenient passage.

The case must be remanded to the Lower Appellate Court for reconsideration in the light of the above observations. The Judge's attention is drawn to the very imperfect decree of the Munsif, which he affirmed. That decree after setting forth the reliefs asked in the plaint, which included a prayer for partition, simply ordered that the suit be decreed. In a case like the present one it was of the utmost importance that the decree should state the precise nature of the relief granted. Costs of this appeal will abide the result.

We desire to state in conclusion that the parties being nearly related to each other would be well advised to settle the dispute amicably.

*Case remanded.*

S. C. B.

## CRIMINAL REVISION.

PROFULLA CHANDRA SEN

v.

EMPEROR.\*

1903

Feb. 13.

*Sanction to prosecute—Public servant—Substantive offence—Abetment—Fresh sanction—Criminal Procedure Code (Act V of 1898) ss. 195, 197, 230—Penal Code (Act XLV of 1860) ss. 109, 468.*

The Inspector-General of Registration, Bengal, wrote a letter to the District Registrar of Tippera, directing the prosecution of a Sub-Registrar on charges under ss. 417 and 468 of the Penal Code. The Sub-Registrar was tried and convicted under ss. <sup>468</sup>/<sub>109</sub> of abetment of forgery for the purpose of cheating. At the trial it was contended on behalf of the accused that there could be no conviction for abetment when sanction had been given for prosecution for the substantive offence only:—

*Held*, that the letter of the Inspector-General of Registration was a sufficient sanction to justify the conviction, and that no fresh sanction was necessary under s. 230 of the Criminal Procedure Code.

**RULE** granted to the petitioner, Profulla Chandra Sen.

This was a Rule calling upon the District Magistrate of Tippera to shew cause why the conviction of the petitioner should not be set aside on the ground that no sanction had been granted for his prosecution for the offence of which he had been convicted

The petitioner, who was Sub-Registrar of Sarail in the district of Tippera, was in consequence of an inquiry made by the District Registrar suspended from his office. In July 1901 the Inspector-General of Registration, Bengal, wrote a letter to the District Registrar of Tippera, directing that the petitioner should be prosecuted on charges under ss 417 and 468 of the Penal Code. The petitioner was tried by the Deputy Magistrate of Comilla, who, having found that ten deeds registered on the 31st October

\* Criminal Revision No. 1054 of 1902, against the order passed by B. K. Mallik, Additional Sessions Judge of Tippera, dated July 8, 1902.

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1899 at the petitioner's office were forgeries, and that they were either forged by the petitioner himself or by his orders with the object of earning for him as Sub-Registrar an additional commission of Rs. 20, convicted the petitioner of three offences under s. 468 read with s. 109 of the Penal Code.

The petitioner appealed, but his appeal was dismissed by the Additional Sessions Judge of Tippera on the 8th July 1902.

Mr. Pugh (Mr. P. L. Roy and Babu Jadu Nath Mandal with him) for the petitioner. No sanction was granted in this case for the prosecution of the petitioner for the offence of which he has been convicted. The petitioner is a Sub-Registrar and a public servant. He was accused of having committed the offences as such public servant. Under s. 197 of the Criminal Procedure Code the sanction of the Government having power to order his removal, or of some Court or other authority to which he is subordinate, was necessary before the trying Magistrate could take cognizance of the case. The petitioner was convicted under s. 468 read with s. 109 of the Penal Code; no sanction was granted by any authority for his prosecution under those sections, and therefore the Court had no jurisdiction to try and convict him.

Babu Srish Chandra Chowdhuri for the Crown. I submit that no sanction was necessary in this case, as the proceedings were instituted under the directions of the Inspector-General of Registration. That in itself was a sufficient sanction. The letter written by the Inspector-General to the District Registrar directing the prosecution of the petitioner was a sufficient sanction for his prosecution under s. 468. The conviction under ss. $\frac{468}{109}$ was based on the same facts as those on which the sanction for prosecution under s. 468 was granted; no fresh sanction was therefore necessary. The sanction which had already been given was sufficient to justify the conviction under ss. $\frac{468}{109}$.

Mr. Pugh in reply. The letter of the Inspector-General, if it could be regarded as a sanction, could only be a sanction for the prosecution of the petitioner of the substantive offence under s. 468 of the Penal Code; there should be a fresh sanction before he could be tried for the abetment of that offence.

HARINGTON J. In this case a Rule was granted calling upon the District Magistrate to shew cause why the conviction and sentence passed on one Profulla Ohandra Sen should not be set aside on the ground that no sanction had been granted for his prosecution for the offence of which he had been convicted.

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Profulla Ohandra Sen was Sub-Registrar of Sarail, in the district of Tippera; he has been convicted of three offences under sections 468 of the Indian Penal Code. It has been found by the Deputy Magistrate that ten deeds registered on October 31, 1899, at the appellant's office were forgeries, and that they were either forged by the appellant himself or by his orders with the object of earning for him as Sub-Registrar an additional commission from the Government of Rs. 20. On appeal the conviction was upheld, but the sentence altered. In support of the Rule it is contended:—

(i) That the Sub-Registrar is a 'public servant' and that he is accused of an offence as such public servant, and that under the provisions of section 197 of the Criminal Procedure Code the sanction of the Government having power to order the removal of the accused, or of some Court or other authority to which the Sub-Registrar is subordinate, is necessary before any Court can take cognizance of the case;

(ii) That no sanction has been granted by any such authority for the prosecution of the accused under sections 468, and therefore the Court had no jurisdiction to try and convict the accused.

It is contended by the learned vakil, who shewed cause against the Rule, that no sanction was necessary, that the institution of proceedings by the sanctioning authority was sufficient sanction, and that in any case a letter, which has been produced, written by the Inspector-General of Registration, Bengal, to the Registrar of Tippera, directing that the accused should be prosecuted, as advised by the Legal Remembrancer, on charges under sections 417 and 468 of the Indian Penal Code, was sufficient sanction to justify a conviction under sections 468. It is contended by the learned counsel, who appeared in support of the Rule, that if the letter be regarded as a sanction, it is only a sanction to prosecute for a substantive

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offence under section 468, and not for abetment of such offence under sections 483. In my opinion, it is unnecessary to discuss the question whether sanction was necessary under section 197 before the appellant could be prosecuted for the offence disclosed by the facts to which I have referred; because if sanction be necessary, the letter of the Inspector-General of Registration is, in my opinion, a sufficient sanction to justify a conviction under sections 483. That letter directs a prosecution under section 468, and it was of a charge under section 468 that the Court took cognizance. On the same facts as those on which the charge under section 468 was founded, the Magistrate convicted the accused of an offence under sections 483. In my opinion, this state of things is provided for by section 230 of the Code of Criminal Procedure, which enacts that if an offence stated in a "new, altered, or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the new or altered charge was founded." Here it cannot be suggested that the charge under sections 483 was founded on any but the same facts as those on which the sanction for a prosecution under section 468 was granted. That being so, no fresh sanction was necessary under section 230 of the Code. The sanction already given was quite sufficient to justify the conviction of the appellant under sections 483. It is unnecessary therefore to discuss the question whether, on the facts disclosed, a sanction under section 197 was necessary. On the ground that the sanction granted was sufficient, the Rule must, in my opinion, be discharged.

We direct that the petitioner be called upon to surrender to his bail and serve the remainder of his sentence.

**BENETT J.** I agree that the Rule must be discharged.

The main contention advanced in support of the Rule is that the sanction given by the Inspector-General of Registration was for the prosecution of the petitioner for offences under sections 468 and 417 of the Indian Penal Code, and not for the abetment of those offences; and that as section 197 of the Criminal Procedure Code contains no sub-section corresponding to sub-section 3

of section 195 of the Code, there could be no conviction for abetment where sanction had been given for prosecution for the substantive offence only. In this argument there appears to be some misunderstanding of the meaning of sub-section 3 of section 195 of the Code. That sub-section lays down that sanction for the prosecution for the abetment of an offence is necessary in the same way as sanction for prosecution for the substantive offence, and the omission of the sub-section from section 197 of the Code of Criminal Procedure cannot have the effect suggested. The sanction given by the Inspector-General of Registration was for the prosecution of the petitioner for certain acts, that is to say, for fabricating false documents and for cheating by means of fabricated documents. This sanction would, in my opinion, cover the abetment of the fabrication of the false documents if that offence was committed for the purpose of cheating by means of those documents. The finding of the Joint-Magistrate is that the ten deeds which were registered on the 31st October 1899 were forgeries, and that they were either forged by the accused himself or by his orders with the object of cheating the Government and obtaining an additional commission of Rs. 20 to which he was not entitled.

The sanction undoubtedly covered the new charge, as it was based on the same facts, and under the provision of section 230 of the Code of Criminal Procedure, no additional sanction was required.

*Rule discharged.*

D. S.

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BRETT J.

## FULL BENCH.

TARA PROSAD LAHA

v.

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May 28.

*"Complaint," meaning of—Prosecution for adultery or enticing away a married woman—Criminal Procedure Code (Act V of 1898), ss. 4, cl. (h), 199.*

The word "complaint," referred to in s. 199 of the Code of Criminal Procedure means a "complaint" as defined by s. 4, cl. (h) of that Code.

*Jatra Shekh v. Reazat Shekh*(1) distinguished.

REFERENCE to a Full Bench in Criminal Appeal by Tara Prosad Laha and others.

On the 7th December 1902, one Doyal Chand Mandal laid an information at the Mograhat police-station to the effect that he had some five or six days before the occurrence complained of, gone to Charmaria Abad to cultivate his land, leaving at home his grandmother, father, and his wife, who was 17 years of age. While away from home he received information that his wife had been carried away from the house. On his return home he found his wife on the roadside, and she told him that on the previous night, after taking her meal, as she came out of the house, the accused caught hold of her, gagged her by putting a cloth into her mouth, and carried her to a jute-field lying to the north of the house, where they forcibly ravished her. She was detained in the jute-field that night and the whole of the next day.

Doyal Chand Mandal charged the accused with the offence of forcibly committing rape upon his wife. The case was sent up by the police under ss. 342, 352 and 354 of the Penal Code, and came before a Deputy Magistrate who committed the accused to take their trial at the Sessions on charges framed under ss. 376, 497 and 498 of the Penal Code. The accused were placed upon their trial before the Additional Sessions Judge of the 24-Perganas and a jury, and at the trial a further charge was added under s. 366 of the Code.

\* Reference to Full Bench in Criminal Appeal No. 991 of 1902.

*Full Bench:* Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Ghose, Mr. Justice Rampini, Mr. Justice Henderson and Mr. Justice Gaidt.

(1) (1892) I. L. R. 20 Calc. 483.



The jury acquitted the accused on the charges under ss. 366, 376 and 497, but convicted them under s. 498. The accused appealed to the High Court.

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At the hearing of the appeal, it was contended on behalf of the appellants that as the husband had only laid an information to the police and had not made a complaint as required by s. 199 of the Criminal Procedure Code, the Court could not take cognizance of the case; the conviction was therefore illegal and must be set aside. It was also contended that if the information was a 'complaint' within the meaning of s. 199 of the Code, it was a complaint of offences under ss. 366 and 376 of the Penal Code, and not a complaint of an offence under s. 498 of the Penal Code; and if it was not a complaint of an offence under s. 498, then s. 238, cl. (3) of the Criminal Procedure Code made the conviction illegal, and the case of *Chemon Garo v. Emperor*(1) was relied on.

On behalf of the Crown it was contended that "complaint" in s. 199 of the Criminal Procedure Code should be construed in its ordinary sense and not limited to "complaint" as defined in that Code, and reliance was placed on the case of *Jatra Shekh v. Rezasat Shekh*(2).

The Criminal Bench of the High Court (HARRINGTON and BRETT JJ.) being of opinion that the decisions in the two cases cited were irreconcilable, referred the matter to a Full Bench in the following terms:—

The appellants in this case have been convicted of an offence under section 498 of the Indian Penal Code, and have been sentenced to 18 months' rigorous imprisonment.

The facts are as follows:—

On December 7th, 1902, Doyal Chand Mandal laid an information at the Mogra-hat police station to the following effect:—

"I, Doyal Chand Mandal of Shibpur, on coming to the thana, am making this statement that five or six days before the occurrence I went to Charmaria Abad to cultivate my land. There were in the house my old grandmother, Saramoni Bewa, father, Chandi Churn Mandal, and wife, Narain Dasi, aged 17 years. Ram Mandal of Tashrala village sent me information in the afternoon of last Thursday that my father is not finding out my wife who has been carried away from the house, but is not known to which place or by whom she has been carried away. On receipt of this information I returned home in the night of the aforesaid Thursday, and I heard from my father, Chandi Churn Mandal, verbally that on the 9th July last,

(1) (1902) J. L. R. 29 Calc. 415. (2) (1892) I. L. R. 20 Calc. 483.

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Wednesday, he had been to Baila Chandi to the house of my sister: my grandmother the aforesaid Saramoni Dasi, and my wife, Narain Dasi, were only in the house. She was not to be seen anywhere from the evening. On learning this I was very much anxious. At about 10 P. M. in the night Nibaran Halder of Tashrala village called me and said that when your wife was being carried by Jogen Laha, Tara Prosad Laha and Uma Charan Das of Shibpur village, I met them on the way. When Jogen, Tara Prosad and Uma Charan Das fled away, your wife caught hold of my feet and was crying. At that time Kala Charan Halder of Tashrala village, who was coming with him from Salipat, also saw my wife. On hearing this I went with him to the roadside, where my wife was said to have taken her seat and to have been crying, and when we arrived there my wife caught hold of my feet, cried and said that yesterday when she was going to wash her mouth and hands after taking her meal at about 8 P. M. and just as she came out Tara Prosad and Jogendra Laha of Shibpur caught hold of her, gagged her by putting a cloth into her mouth and carried her to the jute-field lying at a distance of 8 or 10 *rasis* to the north of the house. When she was being carried there elder Jogen Laha, Suren Dutta, Uma Charan Das, Peary Dutta, Peary Nundy came and joined them in carrying her to the jute-field. There the accused forcibly ravished her. She was detained in the jute-field for the whole night and for the next whole day and was ravished by them. In the night of the next day, as she was in a dying state, Tara Prosad, elder Jogen Laha and Uma Charan Das with the intention of taking her to her house, were carrying her by the road when Nibaran and Kala Chand met them, and they fled leaving her there. After having heard all these I brought her home, and in the following morning I informed Ram Sagar Dutta and the collecting member Elahi Buksh of the occurrence. They having advised me to lodge a complaint at the thana, I came to the thana yesterday. When I came to the thana there was no one except the Munshi, whom I informed of the occurrence. On coming again to the thana this day I lodge my complaint charging the accused with the offence of forcibly committing rape upon my wife. My wife has been much injured and is bedridden—no strength to get up. For that reason I could not bring her here. The Punchayet did not submit any report. He came with me this day. I know to read and write. My statement, which was read over to me, being correctly recorded, I attached my signature to it."

The case was sent up by the police as true under sections 352, 354, 342 of the Indian Penal Code, and came before the Deputy Magistrate in due course. He committed the accused to take their trial at the sessions on charges framed under sections 376, 497, 498 of the Indian Penal Code. The accused were placed upon their trial before the learned Additional Sessions Judge of the 24-Perganas and a jury, and at the trial a further charge under section 366 was added.

The jury unanimously acquitted the accused on the charges under sections 366, 376 and 497, but convicted them under section 498. The accused have appealed to this Court.

On behalf of the appellants it is contended that the Court could not legally take cognizance of the charge under section 498 because no complaint had been made by the husband in accordance with section 199 of the Criminal Procedure Code.

Section 199 of the Criminal Procedure Code is in these terms:—

"No Court shall take cognizance of an offence under section 497 or section 498 of the Indian Penal Code, except upon a complaint made by the husband of the

woman or, in his absence, by some person who had care of such woman on his behalf at the time when such offence was committed."

"Complaint" is defined by section 4, clause (A) of the Criminal Procedure Code thus:—

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"In this Code the following words and expressions have the following meanings unless a different intention appears from the subject or context:—

"(A) Complaint means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, had committed an offence, but it does not include the report of a police officer."

Section 238 provides that a person charged with one offence may be convicted of a minor offence when the particulars proved only constitute a minor offence; but it contains the following clause:—(3) "Nothing in this section shall be deemed to authorise a conviction of any offence referred to in section 198 or section 199 when no complaint has been made as required by that section."

It is contended—

1. That the husband has only laid an information to the police and has not made a complaint as required by section 199 of the Code. The Court therefore could not take cognizance of the case and the conviction must be set aside;

2. That if the information be a complaint within section 199 of the Criminal Procedure Code, it is a complaint of an offence under sections 366 and 376 of the Indian Penal Code, and not a complaint of an offence under section 498 of the Indian Penal Code, and if it be not a complaint of an offence under section 498, then section 238, clause(3) makes the conviction illegal.

In support of these arguments the case of *Chemon Garo v. Emperor*(1) was relied on. In it the Court, following the case of *Empress v. Kallu*(2) held "that a Court could not take cognizance of an offence under section 497 of the Indian Penal Code (and it is submitted, the reasoning applies equally to an offence under section 498 of the Indian Penal Code), without a formal complaint of that offence as provided by law."

For the Crown it is contended that "complaint" in section 199 must be construed in its ordinary sense and not limited to complaints defined in the Criminal Procedure Code. It was urged that the object of the section was to prevent a Magistrate inquiring into differences between husband and wife when the parties were not desirous of moving him so to do, and that object was equally attained whether the complaint was laid to the police or to a Magistrate. It was also contended that the fact stated in the complaint made to the police by the husband sufficiently disclosed an offence under section 498 of the Indian Penal Code to justify the conviction.

Reliance was placed on the case of *Jatra Shekh v. Reazat Shekh*(3), in which when a complaint had been made to the police by a husband of an offence under section 366 committed against his wife, and the Court had convicted the accused under section 498 of the Penal Code, on reference to this Court that conviction was upheld.

The case of *Jatra Shekh v. Reazat Shekh*(3) was not referred to in the case of *Chemon Garo v. Emperor*(1). The decisions in the two cases are in

(1) (1902) I. L. R. 29 Calc. 415. (2) (1882) I. L. R. 5 All. 233.

(3) (1892) I. L. R. 29 Calc. 483.

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our opinion irreconcilable. We accordingly refer to a Full Bench the following question :—

(1) Is the word “complaint” in section 199 of the Criminal Procedure Code limited to complaint as defined in section 4 of the Criminal Procedure Code ?

If that question be answered in the negative, then the question :—

(2) Where a complaint is made by a husband of an offence under section 366 or 376 of the Indian Penal Code, can a charge be added and a conviction be had under section 498 of the Indian Penal Code ?

On this reference,

*Babu Narendra Kumar Bose* for the appellant. The word “complaint” as used in the Criminal Procedure Code has, I submit, a perfectly well-understood meaning. It means an allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown, has committed an offence: see s. 4 (h) of the Code. The Code of 1882 was the first to define what a complaint was, and it has been defined in precisely the same terms in the present Code. Since the Code of 1882 there has been a current of decisions to the effect that the word “complaint” as used in the Code is limited to complaint as defined in s. 4: see *Ishri v. Bakshi*(1), *The Queen-Empress v. Polavarapu*(2), *Queen-Empress v. Monu*(3), *Queen-Empress v. Sham Lal*(4), *Queen-Empress v. Chenchayya*(5).

The only case that may be said to be against me is that of *Jatra Shekh v. Rezasat Shekh*(6). In that case, however, this question was not decided, the case was not argued, and their Lordships seemed to have overlooked this part of the question. S. 199 of the Criminal Procedure Code is in Chapter XVB of the Code, headed “Conditions requisite for initiation of proceedings,” which commences with s. 190, and I submit that the word “complaint” must have the same meaning in s. 199 as it has in s. 190. Further, ss. 198 and 199 provide a special procedure, and must be strictly interpreted—*In re Ganesh Narayan Sathe*(7). I would also refer to the *Queen v. Luckhy Narain Nagory*(8), *Empress v. Kallu*(9), and *Queen-Empress v. Deokinandan*(10).

(1) (1883) I. L. R. 6 All. 96.

(2) (1884) I. L. R. 7 Mad. 563.

(3) (1888) I. L. R. 11 Mad. 443.

(4) (1887) I. L. R. 14 Calc. 707.

(5) (1900) I. L. R. 23 Mad. 626.

(6) (1892) I. L. R. 20 Calc. 433.

(7) (1889) I. L. R. 13 Bom. 600.

(8) (1876) 24 W. R. Cr. 18.

(9) (1882) I. L. R. 5 All. 233.

(10) (1887) I. L. R. 10 All. 39.

*The Deputy Legal Remembrancer (Mr. Douglas White)* for the Crown. The point raised in the letter of reference has not been decided in the case of *Jatra Shekh v. Reazat Shekh*(1), so that decision cannot be said to be at variance with the other decisions of this Court. There has been a series of decisions in which it has been held that the word complaint as used in the Criminal Procedure Code is limited to "complaint" as defined in s. 4, cl. (h) of that Code. The latest cases on the point decided by this Court are the cases of *Kailas Kurmi v. Emperor*(2) and *Jagobundhoo Karmakar v. Emperor*(3).

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**MACLEAN C.J.** In my opinion the question submitted to us ought to be answered in the affirmative. The word "complaint," referred to in section 199 of the Code of Criminal Procedure means a "complaint" as defined by section 4, clause (h) of the same Code. The precise point now before us does not seem to have been decided by Mr. Justice Pigot and Mr. Justice Hill in the case of *Jatra Shekh v. Reazat Shekh*(1). The decisions in this Court and other Courts in India seem to proceed upon the view I have enunciated.

The conviction, therefore, cannot stand and must be set aside.

**GROSE J.** I am of the same opinion. I should desire, however, to add that at one time I was inclined to think that the information lodged by the husband before the police having been placed before the Magistrate in due course, and the Magistrate having taken action upon such information, and the husband in his evidence before the Magistrate having referred to the information before the police, there was a complaint before the Magistrate within the meaning of the word "complaint" as given in section 4 of the Code of Criminal Procedure; but having considered more carefully the different sections of the Code which bear upon the question, and by the light of the various cases which have been quoted before us, I am of opinion that the information before the police could not be regarded as a complaint as defined by the Code.

(1) (1892) I. L. R. 20 Calc. 483.

(2) Ante, p. 285.

(3) Ante, p. 415.

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**RAMPINI J.** I am of the same opinion. It appears to me that when the word "complaint" has been defined in clause (h) of section 4 of the Code of Criminal Procedure, it must be interpreted throughout that Code as bearing that meaning, and, therefore, in sub-section 3 of section 238, the word "complaint" can only mean a complaint made to a Magistrate. That being so, I think, the first question submitted to us must be answered in the affirmative. The second question does not arise.

**HENDERSON J.** I am of the same opinion.

**GEIDT J.** I am also of the same opinion.

D. S.

*Conviction set aside.*

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## CIVIL RULE.

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MUNNA LAL CHOWDHRY

v.

PADMAN MISSER.\*

1908  
May 14.

*Jurisdiction—Sanction to prosecute—Criminal Procedure Code (Act V of 1898), s. 195, sub-ss. (6) and (7)—Subordinate authority—Sonthal Parganas Justice Regulation (V of 1893), s. 15.*

For the purposes of s. 195 of the Code of Criminal Procedure, the Court of the Deputy Commissioner of Sonthal Parganas shall be deemed to be subordinate to the Court of the Commissioner of Bhagalpur. Accordingly, an application against an order of the Deputy Commissioner of Sonthal Parganas, revoking a sanction given by the Subordinate Judge of Godda under s. 195 of the Code of Criminal Procedure, should be made to the Commissioner of Bhagalpur, and not to the High Court.

**RULE** granted to Munna Lal Chowdhry.

This Rule was issued by a Division Bench (GHOSH and PRATT, JJ.) calling upon the opposite party to show cause why an order of the Deputy Commissioner of Sonthal Parganas should not be set aside.

\* Civil Rule No. 64 of 1903 against the order of C. H. Bompas, Deputy Commissioner of Dumka, dated Dec. 2, 1902.

On the 4th October 1902, the Subordinate Judge of Godda, who was also the Sub-divisional Officer of the place, gave sanction for the prosecution of one Ram Sundar Singh and others under sections 177, 182 and 193 of the Indian Penal Code. From that order there was an appeal to the Deputy Commissioner of Sonthal Parganas, who revoked the sanction on the ground that it was passed without jurisdiction. Thereupon Munna Lal Chowdhry moved the High Court against that order and obtained this Rule.

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*Babu Boidya Nath Dutt* for the petitioner.

*Dr. Ashutosh Mukerjee* for the opposite party.

**BANNERJEE AND PARGITER JJ.** After hearing the learned vakils on both sides, we are of opinion that this Rule must be discharged on the simple ground that the application of the petitioner, which is evidently an application under sub-section 6 of section 195 of the Code of Criminal Procedure, ought to have been made to the Commissioner of the Bhagalpur Division, and not to this Court, regard being had to the provisions of section 15 of Regulation V of 1893, and sub-section 7, clause (a) of section 195 of the Code of Criminal Procedure. By sub-section 6 of section 195 any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate; and sub-section 7 says: "For the purposes of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie that is to say, where such appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate." That makes the Court of the Commissioner of the Bhagalpur Division the proper Court to which to make the application.

That being so, we cannot entertain the present application, and the Rule must be discharged with costs.

*Rule discharged.*

M. N. R.

## CRIMINAL REVISION.

1903.  
 Jan. 22.

MAHOMED NUR

v.

BIKKAN MAHTON.

*Evidence—Order unsupported by evidence—Criminal Procedure Code (Act V of 1898) s. 147.*

In proceedings under s. 147 of the Criminal Procedure Code, the first party filed their written statement and the Magistrate having declined to give the second party time to file their written statement, made an order under that section in favour of the first party without recording any evidence :—

*Held*, that the Magistrate ought to have had some evidence in proof of the allegations contained in the written statement; and that there being no such evidence upon which the order could be supported, it should be set aside.

*Haro Mohan Sardar v. Gobind Sahu*(1) distinguished.

THIS was a Rule calling upon the District Magistrate of Patna and upon the first party to show cause why the order of the Subdivisional Officer of Bihar of the 25th September 1902 should not be set aside on the ground that there was no finding that a dispute likely to cause a breach of the peace existed, and that there was no evidence upon which the order could be supported.

The Subdivisional Officer of Bihar, on the basis of a police report and a petition filed by one of the first party, drew up proceedings under s. 147 of the Code of Criminal Procedure calling upon the parties concerned to put in written statements of their claims on the 25th September 1902, and to be ready with oral and documentary evidence, so that an inquiry might be held whether the second party had got the right to put up a dam at the mouth of the canal running west of the Karai reservoir, and whether the second party had got the right to prevent the first party from clearing away the obstructions existing at the mouth of the canal, and meanwhile he directed the issue of notices under s. 144 of the Criminal Procedure Code to both the parties.

Criminal Revision No. 1185 of 1902 against the order of E. F. Ainslie, Subdivisional Officer of Bihar, dated Sept. 25, 1902.

(1) (1902) 7 C. W. N. 351.



On the 25th September the second party filed a petition asking for a fortnight's time in order to file their written statement, but the Subdivisional Officer refused the application. The first party, however, filed their written statement, and the Subdivisional Officer without taking any evidence made an order in their favour permitting them to cut and remove the dam, and directing the second party not to offer any resistance.

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*Babu Umakali Mukerjee (Maulvi Mahomed Mustafa Khan with him)* for the petitioners. The order in this case is one under s. 147 of the Criminal Procedure Code, and the Magistrate has made it without having before him any evidence of the facts. In making an order under s. 147, the procedure to be followed is that which is laid down in s. 145. The Magistrate could not make this order without some evidence to prove the allegations contained in the written statement of the other side: *Ram Krista Patra v. Aghore Naskar*(1).

*Moulvi Mahomed Ishfaq (Babu Joy Gopal Ghose with him)* shewed cause. I submit that the Magistrate had jurisdiction to make the order. It has been decided that an order can be made under s. 145 of the Criminal Procedure Code on written statements filed by the parties, without any evidence of any kind: *Haro Mohan Sardar v. Gobind Sahu*(2). The Magistrate is not bound under s. 147 to take evidence. He had jurisdiction to make the order he did on the materials that were before him, and he having such jurisdiction this Court cannot interfere.

**HARINGTON AND BRETT, JJ.** In this case a Rule was granted calling upon the District Magistrate of Patna and upon the first party to shew cause why the order of the Subdivisional Officer of Bihar, of the 25th September last, should not be set aside on the ground that there was no finding that a dispute likely to cause a breach of the peace existed; and that there was no evidence upon which the order could be supported.

The former of the two grounds was not pressed before us in argument, the argument being directed to the latter ground, namely, that the order was made without any evidence of the fact which would justify the Magistrate in making the order

(1) (1902) 6 C. W. N. 925.

(2) (1902) 7 C. W. N. 351.

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which he did, under section 147 of the Code of Criminal Procedure.

The judgment was not given at once, because, our attention was drawn to a case(1) by the learned vakil, who appeared to show cause against the Rule, which, he said, established the proposition that an order could be made under section 145 on the written statement filed by the parties without any evidence of any sort whatever. We referred to the case(1), and we find that it is not on all fours with the present case, because, in it an order was made, it is true on the written statement of one of the parties, but it was made on the express admission of the other party; and therefore it is not an authority for the proposition that an order can be made without evidence where the party, who in the ordinary course of things, would oppose the order, does not expressly admit the allegation made by the other party.

In the present case the Magistrate appears to have had before him no evidence of any of the facts which would entitle him to make the order in question. The order in question is in fact made under section 147 in which it is provided that the procedure to be followed in making this order is that which is laid down in section 145. In our view, the Magistrate ought to have had some evidence in proof of the allegation contained in the written statement, and that he ought not to have made the order without having some evidence to that effect before him.

On that ground we set aside the order, and direct that the Magistrate do proceed according to law.

The Rule is made absolute.

*Rule absolute.*

D. S.

(1) (1902) 7 C. W. N. 351.

## KEDAR NATH SHAHA

v.

## EMPEROR.\*

1908

June 17.

*Court-fee stamp, sale of—"Sale"—Exchange—Transfer of stamp on promise that one of equal value would be returned—Court-fees Act (VII of 1870), s. 34, cl. (3).*

Where a mukhtear who had purchased a court-fee stamp for a client, transferred it to another client, the latter having agreed to return to the mukhtear another court-fee stamp of the same value, and was convicted of an offence under s. 34 of the Court-fees Act:—

*Held*, that there had been no 'sale' of the stamp within the meaning of s. 34 of the Court-fees Act (VII of 1870), and that the conviction should be set aside.

RULE granted to the petitioner, Kedar Nath Shaha.

This was a Rule calling upon the District Magistrate of Bogra to shew cause why the conviction and sentence of the petitioner should not be set aside.

The petitioner, a mukhtear of the Criminal Court, who had purchased a court-fee stamp of the value of 8 annas for a client, transferred the stamp to another client of his who had immediate need of it for the purpose of submitting a petition to the Magistrate. The latter client promised to return to him another court-fee stamp of the same value, when the client for whom the stamp had originally been purchased arrived in Court.

The petitioner was convicted in a summary trial and fined, under s. 34 of the Court-fees Act of 1870, by the Deputy Magistrate of Bogra on the 23rd April 1903. The judgment of the Lower Court was as follows:—

"Summary and Reasons:—

This is a case of sale of court-fee stamp under section 34, Court-fees Act.

The accused is a mukhtear of the Criminal Court. He transferred a court-fee stamp to a client of his who had immediate need of it for the purpose of submitting a petition to the Magistrate.

\* Criminal Revision No. 447 of 1908, against the order of M. K. Bose, Deputy Magistrate of Bogra, dated April 23, 1908.

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The court-fee stamp of 8 annas was in the hand of the mukhtear, purchased before for another client, but at the time he had no use for it. He therefore transferred it to the new client.

The mukhtear says that this new client promised him to return another court-fee stamp of equal value when the vendor arrived in Court. This statement I accept to be correct, as there is no evidence to the contrary. Now, it is pleaded for the defence that by this transfer of court-fee the mukhtear has not effected a sale, but only caused an exchange.

The definition of the words 'sale and exchange' in the Contract Act and the Transfer of Property Act are cited with a view to shew that the change of one property for another is an exchange, and that the sale requires payment of price, and it is argued that price means money.

But it is apparent from the definition of the word 'exchange' that the two parties between whom it is effected must have the goods in hand or in possession in order to have them exchanged one for the other. When the transfer on one side is effected and the other side promised only, and had not completed the transaction, it comes within the definition of the word 'sale' and not of 'exchange.'

For this reason I find that the accused effected sale by the transfer of the court-fee. He is therefore guilty under section 34 of the Court-fees Act.

The offence is a technical one, and a nominal punishment need only be inflicted."

*Babu Dwarka Nath Mitter and Babu Narendra Kumar Bose*  
 for the petitioner.

**RAMPINI AND HANDLEY JJ.** This is a Rule calling upon the Magistrate of the district to shew cause why the conviction and sentence in this case should not be set aside.

The petitioner has been convicted of an offence under section 34 of the Court-fees Act, VII of 1870, namely of having sold a court-fee stamp of eight annas. The facts do not disclose the commission of any such offence. It appears that the petitioner never sold the stamp at all. He transferred it to another person and was going to take another stamp in exchange, but there was no sale. The conviction, therefore, cannot stand. We set it aside and direct that the fine, if paid, be refunded.

D. S.

*Rule absolute.*

## LOKENATH PATRA

v.

## SANYASI CHARAN MANNA.\*

1903

Feb 27.

*Complaint—Dismissal of complaint—Complainant, examination of—False charge—Criminal Procedure Code (Act V of 1898) ss. 156, 159, 200, 202, 203—Penal Code (Act XLV of 1860) s. 211—Jurisdiction of Magistrates.*

A complaint was made to a Magistrate who, without examining the complainant, sent the petition of complaint under s. 156 of the Code of Criminal Procedure to the police for inquiry, and upon receipt of the police report directed a Sub-Deputy Magistrate to make a preliminary inquiry into the case under s. 159 of the Code, and on receipt of his report the Magistrate, not being satisfied with it, cross-examined the complainant and some of his witnesses, examined some witnesses sent up by the police, and then dismissed the complaint under s. 203 of the Code, and directed the prosecution of the complainant under s. 211 of the Penal Code:—

*Held*, that the order dismissing the complaint was illegal, the Magistrate having no jurisdiction to deal with the case or dismiss it under s. 203 of the Criminal Procedure Code without complying with the requirements of the law as laid down in ss. 200 and 202 of that Code.

**RULE** granted to the petitioner, Lokenath Patra.

This was a Rule calling upon the District Magistrate of Howrah to shew cause why the order of the Deputy Magistrate of Uluberia, dated the 17th of December 1902, dismissing the complaint of the petitioner under s. 203 of the Code of Criminal Procedure and directing his prosecution under s. 211 of the Indian Penal Code, should not be set aside on the ground that he had no jurisdiction to make over the case for preliminary inquiry to the Sub-Deputy Magistrate without first examining the complainant; that the proceedings taken before the Sub-Deputy Magistrate were without jurisdiction; and that the Deputy Magistrate himself not having made a legal inquiry into the complaint had no jurisdiction to dismiss the case or pass the order for the prosecution of the petitioner under s. 211 of the Indian Penal Code.

On the 22nd September 1902 the petitioner made a complaint to the Subdivisional Magistrate of Uluberia charging certain persons

\* Criminal Revision No. 75 of 1903, against the order of P. N. Dutt, Deputy Magistrate of Uluberia, dated Dec. 17, 1902.

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with defamation and with having wrongfully confined him. On receipt of the complaint, the Subdivisional Magistrate, without examining the petitioner, sent the petition of complaint under s. 156 of the Criminal Procedure Code to the police for inquiry. The police investigated into the matter and submitted a report to the effect that the charge of defamation was true, but that there was no foundation for the charge of wrongful confinement.

On receipt of the police report, the Subdivisional Magistrate under s. 159 of the Code directed a Sub-Deputy Magistrate to make a preliminary inquiry into the case. On receipt of his report, on the 17th December 1902, the Subdivisional Magistrate not being satisfied with it, cross-examined the petitioner and some of his witnesses, examined some witnesses sent up by the police, and then dismissed the complaint under s. 203 of the Code, directing the prosecution of the complainant under s. 211 of the Penal Code.

*Babu Atulya Charan Bose* for the petitioner. The Rule should be made absolute. The Subdivisional Magistrate had no jurisdiction to dismiss the complaint under s. 203 of the Criminal Procedure Code without first complying with the provisions of ss. 200 and 202 of that Code. There has been no examination of the complainant, nor has there been any direction to make a previous local investigation as contemplated by those sections. The Subdivisional Magistrate states that he ordered the Sub-Deputy Magistrate to hold the preliminary inquiry under s. 159 of the Code. If that be so, he should have proceeded according to law just as he would have done on receipt of a police report. The order directing the prosecution of the petitioner under s. 211 of the Penal Code depends on the validity of the order dismissing the complaint. If the order under s. 203 is illegal, so also is the order directing the prosecution, as there can be no such order until the complaint has been found to be false.

No one appeared to shew cause.

**HARINGTON AND BRETT JJ.** In this case a Rule was issued calling upon the District Magistrate of Howrah to shew cause why the order of the Deputy Magistrate, dated the 17th December 1902, dismissing the complaint of the petitioner under

section 203 of the Code of Criminal Procedure, and directing his prosecution under section 211 of the Indian Penal Code, should not be set aside on the ground that he had no jurisdiction to make over the case for preliminary inquiry to the Sub-Deputy Magistrate without first examining the complainant; that the proceedings taken before the Sub-Deputy Magistrate and the Bench of Honorary Magistrates were without jurisdiction, and that the Deputy Magistrate himself not having made a legal inquiry into the complaint had no jurisdiction to dismiss the case or pass the order for the prosecution of the petitioner under section 211 of the Indian Penal Code.

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It appears that a complaint was made to the Sub-divisional Magistrate, and that he without examining the complainant sent the petition of complaint to the police for inquiry. On receipt of the police report, he directed the Sub-Deputy Magistrate to make a preliminary inquiry into the case, and on receipt of the report of the Sub-Deputy Magistrate, he, not being satisfied with it, cross-examined the complainant and some of his witnesses, examined three witnesses sent up by the police, and then proceeded to dispose of the case under section 203, dismissing the complaint and directing the prosecution of the complainant under section 211 of the Indian Penal Code. In his explanation the Magistrate has stated that he directed the investigation by the police under section 156, clause (3) of the Code of Criminal Procedure, and that he ordered the Sub-Deputy Magistrate to hold the preliminary inquiry under section 159 of the same Code, and he appears to be of opinion that his own cross-examination of the complainant on the depositions recorded by the Sub-Deputy Magistrate was a sufficient compliance with the law to enable him to deal with the case under section 203 of the Code of Criminal Procedure.

We are unable to accept this view as correct. Section 203 provides that "the Magistrate before whom a complaint is made or to whom it has been transferred, may dismiss the complaint if, after examining the complainant and considering the result of the investigation (if any) made under section 202, there is in his judgment no sufficient ground for proceeding." In this case there has been no previous local investigation ordered under section 202, and there has been no examination of the complainant by the

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Magistrate, who has dismissed the case, such as is contemplated by section 200 of the Code of Criminal Procedure.

We are unable therefore to hold that the Magistrate on the materials before him had jurisdiction to deal with the case, or to dismiss it under section 203. On receipt of the report of the preliminary inquiry under section 159, he should have proceeded to deal with the case in the same way as he would have dealt with it on receipt of a report from a Police officer. He has not done so, but he has dealt with the case as if he had proceeded under sections 200 and 202 of the Code of Criminal Procedure without complying with the requirements of the law as laid down in these sections. We think therefore that he had no jurisdiction to pass an order under section 203; and we accordingly make the Rule absolute and set aside the order passed under section 203 as well as the order directing the prosecution of the petitioner under section 211 of the Indian Penal Code.

If the Magistrate wishes to take any further steps in the matter, he should proceed in accordance with law.

Rule absolute.

D. s.

CRIMINAL REFERENCE.

CORPORATION OF CALCUTTA

v.

ADMINISTRATOR GENERAL OF BENGAL.*

1903
July 7.

Administrator General of Bengal—Sanction to prosecute—Administrator to estate of deceased person—Public servant, offence by—Criminal Procedure Code (Act V of 1898), s. 197—Calcutta Municipal Act (Bengal III of 1899), ss. 320, 574.

The Administrator General of Bengal, who was appointed by the High Court administrator to the estate of a deceased person, was served with a notice by the Calcutta Municipal Corporation under s. 320 (i) cl. (b) of Bengal Act III of 1899, requiring him to remodel a privy on certain premises belonging to that estate. In consequence of his not complying with the requisition he was prosecuted under s. 574 of the Act.

At the trial it was contended that as the Administrator General of Bengal was a public servant not removable from his office without the sanction of the Government of India, he could not, under the terms of s. 197 of the Criminal Procedure Code, be prosecuted without the sanction of such Government:—

Held, that the sanction of Government was not necessary for the institution of the prosecution, s. 197 of the Criminal Procedure Code not being applicable to a case like the present; that the Administrator General of Bengal was in charge of the premises, in respect of which the offence charged was said to have been committed, not by virtue of his office, but by virtue of his appointment by the Court as administrator to the estate of the deceased; and that he was charged with having committed the offence in the latter capacity.

Nando Lal Basak v. N. N. Mitter (1) followed.

REFERENCE under s. 432 of the Code of Criminal Procedure.

In this case the Administrator General of Bengal was, by an order of the High Court, appointed administrator to the estate of one Assaram Burmano deceased, which consisted, *inter alia*, of the premises No. 54 Cotton Street in the town of Calcutta.

On the 25th November 1902 a notice was served by the Municipal Corporation of Calcutta, on the Administrator General, requiring him, under s. 320 (1) (b) of Bengal Act III of 1899, to

* Criminal reference No. 6 of 1903 by P. N. Mukerjee, Municipal Magistrate of Calcutta, dated June 29, 1903.

(1) (1899) I. L. R. 26 Calc. 852.

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thoroughly remodel the privy belonging to the premises in Cotton Street. The requisition in the notice not having been complied with, the Administrator General was summoned by the Municipal Magistrate of Calcutta to answer to a charge under s. 574 of the Act. At the trial it was contended on behalf of the Administrator General that he being a public servant and removeable from his office by the Government of India, he could not, under the provisions of s. 197 of the Criminal Procedure Code, be prosecuted without the sanction of that Government.

On the 25th June 1903 the Magistrate referred, under s. 432 of the Code of Criminal Procedure, for the opinion of the High Court the question,—whether the Administrator General of Bengal could be prosecuted under the Calcutta Municipal Act without the sanction of the Government for non-compliance with the requirements of the Act in respect of houses vested in him as Administrator General.

The letter of reference was as follows:—

“Under the the provisions of section 432 of the Code of Criminal Procedure

Corporation of Calcutta v. Administrator General of Bengal as administrator to the estate of Assaram Burmano under section 320 (1) (b) of Act III (B.C.) of 1899.

I have the honour to refer, for the opinion of the Hon'ble High Court, the following question of law which has arisen in the hearing of the marginally-noted case.

“2. In this case the defendant has been prosecuted for not making certain sanitary improvements in compliance with a notice served on him in respect of premises No. 54 Cotton Street, which form part of the estate of the late Assaram Burmano, the Administrator General having been appointed administrator of the estate by an order of Court on the death of the executors appointed by the will.

“3. The defendant contends that as under the Administrator General's Act as amended by Act V of 1902 that officer is a public servant appointed, paid and removeable from his office by the Government of India, he could not be prosecuted without the sanction of that Government under s. 197 of the Code of Criminal Procedure for acts done as such public servant, and he includes therein everything done in the discharge of his official functions, *e.g.*, carrying out sanitary improvements in premises which form part of estates vested in him. He has to do with such premises only in his official capacity as Administrator General.

“4. On behalf of the prosecution it is urged that previous sanction, under s. 197 of the Code of Criminal procedure is necessary in those cases in which the offence charged is an offence which can be committed by a public servant only, *i.e.*, cases in which being a public servant is a necessary element in the offence, an

this view is supported by the recent decision of the Madras High Court in the case of *The Municipal Commissioners for the City of Madras v. Major Bell*(1) and the Calcutta case of *Nando Lal Basak v. N. N. Mitter*(2). In these cases the defendants were prosecuted by name. In the present case the defendant is referred to in the application for summons both as Administrator General of Bengal and as administrator to the estate of the late Assaram Burmano. I am not sure if that makes any difference.

"5. The question for decision is whether the Administrator General of Bengal can be prosecuted under the Calcutta Municipal Act without the sanction of the Government for non-compliance with the requirements of the Act in respect of the large number of houses vested in him as Administrator General."

M. Donogh (Babu Dwarka Nath Chakravarti with him) for the Corporation of Calcutta. The question is whether the Administrator General of Bengal, who is a public servant, can be prosecuted under the circumstances of this case without the sanction of the Government of India. He was called upon by the Corporation to carry out certain sanitary improvements in certain premises, of which he was appointed administrator by the Court. This he did not do, and has in consequence been prosecuted. The improvements he was called upon to make would not be made by him in his official capacity as Administrator General, but as his capacity of administrator to the estate of the deceased, and they could have been equally made by anyone else whom the Court might have appointed administrator. The accused is not being prosecuted as the Administrator General of Bengal; the fact of his being the Administrator General is accidental. If your Lordships will refer to the letter of reference, it will show that in the application for summons in this case the accused is referred to both as Administrator General of Bengal and as administrator to the estate of the late Assaram Burmano. No sanction was therefore necessary. Previous sanction under s. 197 of the Criminal Procedure Code is necessary only in those cases in which the offences charged are such as can be committed by a public servant as such, and they are defined in Chapter IX of the Penal Code: *Nando Lal Basak v. N. N. Mitter*(2), *The Municipal Commissioners for the City of Madras v. Major Bell*(1).

Mr. Camell (Babu Surendra Nath Roy with him) for the Administrator General of Bengal. It is conceded by the prose-

(1) (1901) I. L. R. 25 Mad. 15.

(2) (1899) I. L. R. 26 Calc. 532.

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cution that the Administrator General is a public servant as understood by s. 197 of the Criminal Procedure Code. The whole question is a matter of construction. There is a conflict of authority, and in that case, sections of the Code must be construed on their plain wording. Acts of which a public servant is accused "as such public servant" include all acts done by him in the discharge of his official functions. If the accused were not the Administrator General, he would be in no way connected with the premises. The offence alleged against him can be alleged against him only in his official capacity. He is accused as a public servant, and is, therefore, entitled to the protection under s. 197 of the Criminal Procedure Code. It is true that on the death of the executors under the will, the Court passed an order appointing the Administrator General of Bengal administrator to this estate, but that was only by way of procedure. On the failure of executors appointed by the will, and on the failure of the next of kin to apply for Letters of Administration, or for the appointment of an administrator, the Administrator General by virtue of his office is entitled to have himself appointed administrator to the estate of the deceased: see s. 16 of the Administrator General's Act (II of 1874). Acts committed or omissions made by the Administrator General in the discharge of his official duties are not accidental to the office, but a necessary consequence of his appointment to that office. In the cases of *In re Gulam Muhammad Sharif-uddaulah*(1) and *Sreemanto Chatterjee*(2) it was decided that sanction was necessary before a public servant could be prosecuted for acts done in the discharge of his duties. The decision in *The Municipal Commissioners for the City of Madras v. Major Bell*(3) was based on the omission in s. 197 of the Criminal Procedure Codes of 1882 and 1898 of the second paragraph, which was to be found in the corresponding section of the Code of 1872, viz., s. 466. It was evidently not the intention of the Legislature to limit the application of s. 197 of the present Code. The second paragraph was omitted from the later Codes because it was redundant. S. 197 of the present Code, which differs in wording from s. 466 of the Code of 1872, embodies

(1) (1886) I. L. R. 9 Mad. 439.

(2) Unreported.

(3) (1901) I. L. R. 25 Mad. 15.

both the first and second paragraphs of s. 466 of the Code of 1872.

The authorities quoted against the defence are not applicable, as in those cases the proceedings were taken against the individual; whereas in this case the question submitted to this Court is whether sanction is necessary for the prosecution of the Administrator General in respect of acts performed with reference to estates vested in him as Administrator General. Clearly the accused is charged in his official capacity. The Government of India is responsible for the public acts of public servants done within the scope of their authority, and the object of s. 197 is that a certain formality should be observed for the protection of public servants from groundless prosecutions, namely, that the sanction of the Government be first obtained.

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BAVERJEE AND HANDLEY JJ. This is a reference by a Presidency Magistrate, namely, the Municipal Magistrate of Calcutta, under the first part of section 432 of the Code of Criminal Procedure; and the question upon which our opinion is asked as stated in the 5th paragraph of the letter of reference is "whether the Administrator General of Bengal can be prosecuted under the Calcutta Municipal Act without the sanction of the Government, for non-compliance with the requirements of the Act in respect of the large number of houses vested in him as Administrator General." Though the question is stated in the manner set out above, in paragraph (2) of the letter of reference is stated a fact which has some bearing upon the question submitted to us for our opinion; and that fact is this,—that the Administrator General has been appointed administrator to the estate to which the house in question appertains, by an order of Court on the death of the executors appointed by the will of the late proprietor. That being then the question submitted for our opinion, the point for consideration is whether the sanction of the Government is necessary for the institution of the prosecution in a case like that contemplated in the reference.

Now the provision of law requiring the sanction of Government is that embodied in section 197 of the Code of Criminal Procedure which says that "when any Judge or any public

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servant not removable from his office without the sanction of the Government of India or the Local Government, is accused as such Judge or public servant of any offence, no Court shall take cognisance of such offence except with the previous sanction of the Government having power to order his removal," &c. &c.; and the question then is reduced to this, namely, whether the partly charged with the offences under the Calcutta Municipal Act, III (B. C.) of 1899, is accused as a public servant of the offences charged. The party holds the office of Administrator General of Bengal, and as such he is not removable from his office without the sanction of the Government of India. That is conceded; but the contention of the learned counsel for the Corporation of Calcutta is that the party accused is not accused in this case as the Administrator General of Bengal; that the fact of his being the Administrator General of Bengal is only an accident; and that another person might have been appointed as administrator to the estate of the late Assaram Burmano and placed in charge of the premises in respect of which the offence charged is said to have been committed. And in support of this contention we are referred to the 4th paragraph of the letter of reference in which it is stated that in the present case the defendant is referred to in the application for summons both as Administrator General of Bengal and as administrator to the estate of the late Assaram Burmano.

It is further argued on behalf of the Corporation of Calcutta that section 197 of the Code of Criminal Procedure is limited in its application to that class of offences which are defined in chapter IX of the Indian Penal Code, and which can be committed only by a public servant as such; and in support of this view the case of *Nando Lal Basak v. N. N. Mitter*(1) is relied upon, and also the case of *The Municipal Commissioners for the City of Madras v. Major Bell*(2).

On the other hand, the learned counsel for the opposite party argues that we must take the words of section 197 as they are, and that those words, taken as they are, would cover a case like the present, where a public servant, namely, the Administrator

(1) (1899) I. L. R. 26 Calc. 852.

(2) (1901) I. L. R. 25 Mad. 15.

General of Bengal, who is not removable from his office without the sanction of the Government of India, is accused of an offence, not in his private capacity in which he has no concern with the premises in respect of which the offence charged is said to have been committed, but in his official capacity as Administrator General of Bengal in which capacity alone he has any concern with the said premises; and in support of this contention *In re Gulam Muhammad Sharifuddaulah*(1) is cited.

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After considering the arguments on both sides, the conclusion we come to is this, that section 197 of the Code of Criminal Procedure is not applicable to a case like the present, and that the sanction of the Government is not necessary for the institution of the prosecution such as the letter of reference contemplates. It is true, the party charged with the offence in this case holds the office of Administrator General of Bengal; but it is only an accident that the holder of that office is in charge of the premises in question. The capacity in which he is charged is his capacity as administrator to the estate of the late Assaram Burmano, a capacity which might have belonged to him even though he had not been the Administrator General of Bengal, for the Court might in certain events have appointed any other person than the Administrator General as administrator to the estate of the late Assaram Burmano; and the Administrator General of Bengal is in charge of the premises in question not by virtue of his office but by virtue of his appointment by the court as administrator to the estate of the late Assaram Burmano. The requirement of section 197, that the party charged should be accused as a public servant of any offence, is, therefore, in our opinion not satisfied in this case. The view we take is in accordance with that taken in the case of *Nando Lal Basak v. N. N. Mitter*(2).

It is unnecessary for us in this case to express any opinion as to whether section 197 of the Code of Criminal Procedure is absolutely limited to the offences defined in Chapter IX of the Indian Penal Code. All we decide now is that in a case like the present, one of the requirements of the section, namely, the one we have referred to above, that the party charged is accused as a public servant

(1) (1886) I. L. R. 9 Mad. 439.

(2) (1899) I. L. R. 26 Calc. 852.

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of the offence with which he is charged, has not been satisfied, and that the section, therefore, does not apply to this case.

The reference will be returned with the expression of our opinion embodied in the foregoing observations.

D. S.

ORIGINAL CIVIL.

KADAMBINI DASSI

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KUMUDINI DASSI.*

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 July 15.

Practice—Evidence on commission—Oaths Act (X of 1873) s. 13—Foreign Territory—Civil Procedure Code (Act XIV of 1882) ss. 387—399.

A commission was issued by the High Court to take the evidence of a witness in Chandernagore (French territory) under s. 387 of the Civil Procedure Code; and the provisions of the Code, so far as they applied, were complied with:—

Held, that the commission was rightly issued and executed under ss. 387 and 399 of the Code.

Held, also, that an affirmation (as required by the commission) having been administered and the evidence duly recorded, the commission was correctly executed.

IN July 1902 Kadambini Dassi, the mother of Gopal Lal Seal, deceased, and one Nogendro Nath Mitter applied to the High Court for grant of probate of a will alleged to have been executed by the said Gopal Lal Seal, who died at Chandernagore, on the 25th May 1902. A caveat was entered against the grant of probate by Kumudini Dassi and Nayan Manjari Dassi, the two surviving widows of the deceased. Subsequently Kadambini Dassi, the mother of Gopal Lal, died, and the suit was proceeded with on behalf of the sole surviving plaintiff, Nogendra Nath Mitter. During the hearing of this suit it was proposed by counsel for the younger widow, Nayan Manjari, to read the evidence taken on commission at Chandernagore, of one Sadhu Charan Mukerjee.

* Original suit No. 11 of 1902.

Mr. B. C. Mitter (the *Offg. Advocate-General*, *Mr. J. G. Woodroffe* and *Mr. J. N. Banerji* with him) for Nayan Manjari. I propose to read the evidence of Sadhu Charan Mukerjee taken on commission at Chandernagore.

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Mr. A. Chaudhuri (*Mr. Garth*, *Mr. Chakravarti*, *Mr. Knight* and *Mr. Seal* with him) for the plaintiff, Nogendra Nath Mitter. I object to that evidence being read. As the witness resided in French territory, the oath administered to him was not binding on him, being the oath of this Court. This Court should have requested the French Court to execute that commission. I think I protested at the time of the commission. [HENDERSON J. Not on that ground.] Indian Oaths Act, ss. 6, 13; and Hume-Williams' Evidence on Commission, pp. 53, 55 referred to.

Mr. Jackson (*Mr. Sinha* and *Mr. Falkner* with him) for Kumudini Dassi. The word "omission" in s. 13 of the Oaths Act means any omission: see *The Queen v. Sewa Bhogta* (1).

[STEPHEN J. Do you mean to say that this Court cannot issue any commission to be executed in French territory?]

Mr. Chaudhuri. Except requesting the Court there to execute it, this Court should give such directions for administering the oath to the witness as might be binding on him: see *Queen-Empress v. Shava* (2).

The Offg. Advocate-General (*Mr. Pugh*) in reply. If the Evidence Act and the Oaths Act are not in force in this matter, then it is governed only by the Civil Procedure Code, and s. 387 of the Code distinctly applies to this case: Ameer Ali and Woodroffe's Evidence Act (1st edition), p. 45, s. 5, referred to.

Mr. Jackson. S. 399 of the Code goes with s. 387.

[HENDERSON J. In *Aga Mohammed Jaffer Tehrani v. Mirza Nasirullah* (3), Peacock C.J. observed (where a commission was issued for the examination of a witness in the kingdom of Ava) that if the evidence were given on oath or affirmation, as required by the commission, such evidence would be admissible.]

(1) (1874) 14 B. L. R. 294.

(2) (1891) I. L. R. 16 Bom. 359.

(3) (1868) 2 B. L. R. (A. C.) 73.

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STEPHEN AND HENDERSON JJ. An objection has been taken to the reading of the evidence on commission of Sadhu Charan Mukerjee. It appears that the commission was issued by this Court to take the evidence of the witness in Chandernagore, which is outside the jurisdiction of this Court and in French territory. The commission was plainly rightly issued under section 387 of the Code of Civil Procedure, and being issued it became necessary to execute it according to the provisions of section 399 of that Code. The provisions of the Code of Civil Procedure, so far as they apply, appear to have been complied with. The affirmation (required by the commission to be made) has been administered, and the evidence has been duly recorded. Under the circumstances the commission seems to have been correctly executed within the provisions of the Civil Procedure Code, and we cannot see that section 13 of the Oaths Act, which has been mentioned before us, has any application. Under these circumstances we hold that the evidence taken on commission may be read.

Attorney for the plaintiff: *N. C. Bose.*

Attorneys for Kumudini Dassi: *Kali Nath Mitter* and *Sarbadhikari.*

Attorneys for Nayan Manjari Dassi: *S. D. Dutt & Gupta.*

R. G. M.

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May 8.

*Creditor, right of suit by—Debt incurred by Receiver—Estate, liability of—
Receiver, personal liability of—Executor or Trustee, nature of liability of—
Banian, lien of—Damages.*

A creditor is entitled to proceed against the representative of an estate for recovery of debt incurred by the Receiver during the management of the estate by him: the right to maintain such suit against the representative is founded on the just and equitable principle that as the acts of a Receiver, acting within his authority, are the acts of the Court, the estate cannot be permitted to enjoy the benefit of those acts without being held responsible for the obligations arising out of them.

Burt, Boulton & Hayward v. Bull (1) referred to and explained.

A Receiver occupies a position towards an estate in his hands different from that of an executor or trustee: the latter not acting through or under directions of the Court do not and cannot under ordinary circumstances create obligations binding on the estate in favour of creditors.

On termination of a banianship agreement, a banian's lien is indivisible and extends over every portion of the goods come into his possession as security for advances made by him, and he has a right to insist upon retaining the entire quantity of goods in his possession until the full amount of his claim is paid, and he is not liable for damages for refusing to deliver certain portions only of those goods on payment of their full value.

ORIGINAL SUIT.

One Pokhiram, who carried on a business of merchant and commission agent under the name of Sewaram Buldeo Dass, died on the 6th of April 1901, leaving a large estate, which included the said business as one of the assets. On the 26th of April his cousin, Behary Lall, applied to this Court for grant to him of Letters of Administration to the estate of the deceased. A *caveat* was entered by Shyama Bibi, the present defendant. By consent of both parties, Mr. K. Chaudhuri, Barrister-at-Law, was appointed Receiver of the estate of the said deceased with

* Original Civil Suit No. 882 of 1902.

(1) [1895] I. Q. B. 276.

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power, *inter alia*, to carry on the business of the said firm of Sewaram Buldeo Dass for the purpose of winding up the business. By an order made on the 5th of July 1901, leave was given to the Receiver to employ a banian for the purposes of carrying on the business with a view of winding it up. The plaintiff's firm was appointed as banian, and business was done between the firm and the Receiver as manager of Sewaram Buldeo Dass. In the course of those dealings large advances were made by the plaintiff's firm to the Receiver for the benefit of the estate, and a large quantity of goods came into the possession of the plaintiff's firm as security for those advances.

Some time in the month of August 1901 the application of Behary Lall for Letters of Administration had been refused, and shortly thereafter the present defendant applied to be appointed as administratrix to the estate of Pokhiram, the said deceased. On the 23rd of May 1902 Letters of Administration were granted to the present defendant, who thereupon applied for and obtained the discharge of the Receiver. The order discharging the Receiver was made on the 22nd of July 1902.

It was alleged that the banianship accounts had been made up on behalf of the plaintiff's firm and compared with the Receiver's accounts, and that the two tallied except as regards a very small sum of about 100 rupees. The Receiver having been discharged and the plaintiff's firm not being able to receive payment of the sum due to them instituted this suit against the defendant as representing the estate of the said deceased for recovering the amount, asking that the goods in their possession might be ordered to be sold and the proceeds applied towards the debt due to them; and that if the sale-proceeds be not sufficient, the amount of the deficiency might be ordered to be paid out of the estate of the said deceased in the hands of the defendant.

In the written statement it was not suggested that the dealings in respect of which this action was brought were in any way unauthorized by the powers vested in the Receiver, or that the estate had not received the full benefit of all the moneys advanced by the plaintiff's firm. It was stated that subsequent to the discharge of the Receiver the conduct of the plaintiff's

firm had resulted in causing damage to the defendant, because in the year 1902, whilst the goods over which the plaintiff's firm claimed a lien were in their possession, the defendant made demands from time to time for delivery of certain portions of those goods on payment of their full value, but the plaintiff's firm wrongfully refused to make over the goods, and the defendant suffered loss in consequence of such refusal to deliver.

At the hearing, a contention in the nature of a demurrer was raised by the defendant, urging that the plaintiff's proper remedy was against the Receiver alone, and that the estate could not be proceeded against for recovering the debt incurred in course of dealings had with the Receiver.

Mr. Jackson (Mr. Chakravarti and Mr. B. C. Mitter with him) for the defendant. The plaintiff's remedy is against the Receiver, who is personally liable on contracts entered into by him for the purpose of carrying on the business. He cannot proceed against the defendant as representing the estate: *Burt, Boulton & Hayward v. Bull*(1), *Sargant v. Read*(2), *Taylor v. Neate*(3).

Mr. Dunne (Mr. A. Chaudhuri and Mr. Sinha with him) for the plaintiffs. The Receiver no doubt incurs personal responsibility, but the cases cited nowhere lay down that a creditor has no remedy against the estate. The observations of Rigby L.J. in *Burt, Boulton & Hayward v. Bull*(1) go to shew that a creditor's right to proceed against the Receiver personally is recognized as a remedy additional to that which a creditor has in respect of the assets of the estate: *Dowse v. Gorton*(4), *Brooke v. Brooke*(5), and *Raybould v. Turner*(6).

Mr. Chakravarti in reply cited the following cases: *Shearman v. Robinson*(7), *Strickland v. Symons*(8), *Gosling v. Gaskel*(9), *Fraser v. Murdoch*(10), and *In re Skard* (11).

(1) [1895] 1 Q. B. 276.

(2) (1876) 1 Ch. D. 607.

(3) (1888) 39 Ch. D. 538.

(4) [1891] A. C. 190.

(5) [1894] 2 Ch. 630.

(6) [1900] 1 Ch. 199.

(7) (1880) 15 Ch. D. 548.

(8) (1884) 26 Ch. D. 245.

(9) (1897) 66 L. J. Q. B. 848.

(10) (1881) 6 App. Cas. 855, 874.

(11) (1901) 1 L. R. 28 Calc. 574.

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SALE J. This is a suit by a creditor to recover a very large sum of money from the defendant advanced to the estate of Pokhiram deceased, in course of the dealings had between the plaintiff's firm and the Receiver of that estate appointed by this Court.

The facts under which the claim arises are as follows:— One Pokhiram died on the 6th April 1901, leaving a large estate, which included as one of the assets of the estate a business of merchant and commission agent which was carried on by him under the name of Sewaram Buldeo Dass. On the 26th April 1901, one Behary Lall, a cousin of the deceased, applied to this Court in its Testamentary and Intestate Jurisdiction for grant of Letters of Administration to the estate of the deceased. A *careat* was entered by the present defendant, and on that day, that is, the 26th April 1901, by consent of both parties, Mr. K. Chaudhuri, a Barrister and Advocate of this Court, was appointed Receiver of the estate and effects of the said deceased with power, *inter alia*, to carry on the business of the said firm of Sewaram Buldeo Dass for the purpose of winding up the business. Subsequently the Receiver found it essential, for the purposes of carrying on the business, with the view of winding it up, that he should have the services of banians, inasmuch as no funds were available for the purposes of obtaining delivery of goods belonging to the estate in the hands of banks and other creditors. Negotiations were entered into with the plaintiff's firm, Tejpal Brahmodutt, and the assent of the plaintiff's firm was obtained to act as banians of the business of Sewaram Buldeo Dass on certain terms and on obtaining the assent of the plaintiffs, an application was made to this Court on the 5th July 1901, for leave to the Receiver to employ the plaintiff's firm as banian upon certain terms, and by an order made on the same date leave was given to the Receiver to employ a banian upon the terms proposed for the purposes of the business which the Receiver was authorized to carry on. No formal agreement was drawn up between the plaintiff's firm and the Receiver as regards the terms on which the plaintiffs were to act as banians, but a draft was made of the proposed terms which were assented to by the attorney acting on behalf of the present defendant. Business was done between the plaintiffs and the Receiver as

manager of the business of Sewaram Buldeo Dass. In the course of those dealings large advances were obtained by the Receiver for the benefit of the estate in his hands, and a considerable number of bales of piece-goods came into the possession of the plaintiffs as security for advances made by the plaintiffs to the Receiver for the purposes of the business.

On the 23rd May 1902, Letters of Administration to the estate of Pokhiram were issued to the defendant. It appears that in the previous month of August the application of Behary Lal had been refused, and thereupon, or shortly thereafter, the present defendant applied to be appointed an administratrix to the estate of Pokhiram, but the order granting her Letters of Administration to the estate of Pokhiram does not appear to have been made until the 23rd May 1902, and shortly after she was appointed administratrix to the estate of Pokhiram, she applied for and obtained the discharge of the Receiver. The order discharging the Receiver was made on the 22nd July 1902.

The plaintiffs allege in the plaint that the banianship accounts which had been made up on behalf of the plaintiffs had been compared with the Receiver's accounts and the two tallied, except as regards a small sum—a little more than 100 rupees,—and the plaintiffs not being able to obtain payment of the sum due to them from the estate of the deceased and the Receiver having been discharged, now sue to recover the amount from the estate of the deceased, asking that the goods in their possession may be sold and the proceeds applied towards the debt due to the plaintiffs, and that they may recover the balance from the estate of Pokhiram in the hands of the defendant. That shortly is the nature of the present suit. The defendant has filed a written statement which does not impugn in any way the acts or conduct of the Receiver or suggest that the dealings in respect of which the present suit has been filed are in any sense unauthorized by the powers vested in the Receiver, but the defendant in the written statement confines her defence to certain matters touching the account which the plaintiffs seek to have taken. At the hearing, however, a contention was raised which was really in the nature of a demurrer disputing the right of the plaintiffs to maintain the suit. It is alleged that the right of the plaintiffs in respect of the dealings which are

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the subject-matter of the suit is a right which can only be enforced against the Receiver, and the suit against the defendant as representing the estate of Pokhiram is misconceived. It is not easy to apprehend in what way this contention can be supported so far as the claim of the plaintiffs is concerned as regards the goods in the possession of the plaintiffs' firm, and in respect of which they claim to enforce their lien. They seek to have these goods sold, and seeking in this way to deal with the goods in question, it is not easy to see how or in what way the plaintiffs could proceed to enforce their lien except in a suit to which the representative of the estate is a party. No doubt the claim is more than this. The plaintiffs ask to recover the balance of their claim after obtaining satisfaction *pro tanto* from the sale-proceeds of the goods in their hands out of the general estate in the hands of the defendant.

It has been strongly urged that the plaintiffs are not entitled to proceed against the estate to recover the debt incurred in course of dealings with the Receiver appointed by this Court, and it is said that the plaintiffs' proper remedy, if any, is against the Receiver alone. Now I am not aware of any case in which the question which is now raised has been dealt with, nor do I think the cases which have been cited in the course of the arguments support the contention put forward on the part of the defendant. No doubt the cases cited show that where the Receiver has been authorized to carry on a business that it is a necessary result of his appointment that he should render himself personally responsible for debts incurred in course of his dealings, but nowhere is it suggested that this is the only remedy which a creditor has in realizing his debt, and indeed, I think there is very much in the case of *Burt, Boulton & Hayward v. Bull*(1), which is a case strongly relied on by the defendant, which goes to show that this remedy against the personal responsibility of the Receiver is really recognized as a remedy additional to that which the creditor has in respect of the assets of the estate with which he has been dealing through the Receiver. I need only refer to the observations made by Rigby, L. J., in the course of his judgment. After dealing with the undoubted personal

(1) [1895] 1 Q. B. 276.

responsibility incurred by the Receiver in respect of his dealings with the creditors of the estate, Rigby, L. J., says :—“The Court could never have intended by its action to bring about such a state of things as that a business might be carried on perhaps for years, and then, owing to failure of the assets, all the creditors should go without payment.” I think it is not too much to say that none of the learned Judges who decided the cases which have been cited ever supposed that the opinion they expressed as regards the personal responsibility of the Receiver had the effect or could be so regarded of cutting down or restricting in any way the creditor's right of recovering his debt directly from the estate so long as there remained any assets of that estate available for that purpose.

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Now, as shortly as possible, I will state what I think is the principle underlying the right of a creditor to recover his debt from an estate with which he has had dealings through a Receiver. It appears to me that a creditor's dealings with executors or trustees carrying on a business for the benefit of an estate in their hands, but which estate is not under the direct control or management of the Court, are not quite in the same position in relation to that estate as the dealings of creditors with a Receiver acting under direct orders of the Court. In the latter case creditors deal with the Court through its Receiver, and the Court imposes obligations on the estate through the Receiver for protection of creditors dealing with the Receiver. It doubtless is the law, as appears from the case already cited, that in carrying on a business under directions of the Court a Receiver must necessarily incur personal obligations, but in incurring these personal obligations it seems to me that he necessarily and under the authority of the Court imposes obligations on the estate for the benefit of those creditors with whom he has dealt, and which obligations the Court ought and does give effect to and it is in this respect that a Receiver occupies a position towards an estate in his hands different from that of an executor or trustee. The latter not acting through or under directions of the Court do not and cannot under ordinary circumstances create obligations binding on the estate in favour of creditors and it appears to me that the power of a Receiver to bind an estate in his

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hands in favour of creditors dealing with him so long as he acts within his authority, is as necessary a consequence of the Court's managing or carrying on a business through a Receiver as the personal responsibility of the Receiver in acting under that authority.

Numerous instances may be cited where the Court enforces obligations created by a Receiver in favour of creditors as against the estate in respect of which those obligations have been incurred. For example, leases and mortgages executed by a Receiver have frequently been enforced by this Court as against parties beneficially interested in the estate. Debts also, due to creditors for goods supplied to a Receiver have been ordered to be paid summarily on motion where there is a fund in Court belonging to the estate, and instances of this class may be cited as shewing that the attitude of the Court towards creditors who have dealt *bona fide* with a Receiver of an estate is rather to assist such creditors to recover their amounts due from the estate than to throw obstacles in their way.

In the event of a Receiver being sued for acts done by him as such he would doubtless be entitled to rely on his right to indemnity as against the estate; and in order to try this question of indemnity it would be necessary to secure the presence of the beneficiaries or others as parties to the suit who are interested in questioning the authority of the Receiver. But I do not think that it is necessary to resort to the doctrine of the creditors' right to the benefit of the Receiver's indemnity as a foundation for the right to sue the estate for a debt incurred by the Receiver. A right to maintain such a suit is, in my opinion, founded on the just and equitable principle that as the acts of a Receiver so long as they fall within his authority are the acts of the Court, the estate cannot be permitted to enjoy the benefit of those acts without being held responsible for the obligations arising out of them. If this be the principle which is applicable to the facts of the present case there can be no question that the plaintiffs are entirely justified in the course they have adopted in seeking to recover their claim against the estate in the hands of the present defendant.

I arrive at this conclusion dealing with the argument as of the nature of a demurrer and assuming that the facts in the plaint

are true; the written statement of the defendant admits all the material facts to which I have referred, and the defence is based not upon an allegation that the acts of the Receiver are in any sense improper or unauthorized or that the estate has not had the full benefit of all the monies advanced by the plaintiffs, but it is said that subsequent to the discharge of the Receiver the conduct of the plaintiffs has resulted in causing damage to the defendant. It is said that in the year 1902 whilst the goods over which the plaintiffs claim a lien were still in the plaintiff's possession, that the defendant made demands from time to time for delivery of certain portions of those goods on payment of their full value and that the plaintiffs wrongfully declined to make over to the defendant the goods in respect of which the full value was offered to the plaintiffs, the result being there was loss to the defendant of the prices which they would have obtained for those goods. It is contended that the plaintiffs had no right to refuse to deliver the goods in respect of which demands were made in as much as by obtaining the full value of the goods the delivery could not have been prejudicial to the plaintiffs for they would have had the value of the goods represented in money in place of the goods themselves. This argument, it seems to me, does not affect the right of the plaintiffs to hold, if they were so advised, after cessation of the banianship, the entire amount of the goods in their hands at the time the plaintiff's firm ceased to act as banian for the defendant's business, as security for the total amount of their claim representing the advances made on the goods, interest on the advances and commission.

Whether the plaintiffs were well advised or ill advised in insisting upon what I think was their right, is not a question which affects the present suit. All that is necessary to be said is that as the plaintiff's lien was indivisible and extended over every portion of the goods for the entire debt, they had a right to insist upon retaining the entire quantity of the goods in their possession until the entire amount of their claim was paid. That being so, it seems the case for damages made by the defendant fails. That is in substance, the only defence to the suit raised by the written statement. It appears to me that the plaintiffs are entitled to have an account taken of what is due

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to them on the banianship dealings in respect of the firm of Sewaram Buldeo Dass; and in taking that account the defendant is entitled to raise the question which she has raised in the 6th paragraph of her Written Statement in respect of Rs. 19,179-9-3 alleged to be due in respect of certain chitties which the defendant says the plaintiffs ought to have realized.

An order has already been made in course of the suit giving the plaintiffs the right to sell the goods in their possession and hold the proceeds pending the determination of the suit. The present decree does not affect in any way that order which I think must remain in full force and effect.

The costs of suit reserved until the taking of the accounts.

Judgment for plaintiff.

Attorneys for the plaintiff's firm: *Manuel & Agarwalla.*

Attorney for the defendant: *S. C. Mitter.*

S C. B.

APPELLATE CIVIL.

BANARASI PERSHAD

v.

MAKHAN ROY.*

1908

June 19.

Rent, suit for—Money admitted to be due to landlord—Burden of proof—Plea of 'confession and avoidance'—Rate of rent—Bengal Tenancy Act (VIII of 1885), s. 150.

Section 150 of the Bengal Tenancy Act is limited in its operation to those cases in which the plea of the tenant is one in respect of which the burden of proof lies upon him; in other words, where it is a plea of confession and avoidance. The section does not, therefore, apply to a case where the rate of rent is in dispute.

SECOND APPEAL by the plaintiff, Banarasi Pershad.

The plaintiff brought two suits for rent against the defendant for the years 1303 to 1306 F.S. with cesses and damages. In one of the suits, namely No. 482 of 1899, the rent was claimed for 11 bighas 8 cottahs of *jote* land at the annual rent of Rs. 26-8 2½ dams. The defendant in his evidence admitted that rent was due for the period in suit, but that it was for 9 bighas of *jote* land at the annual rent of Rs. 9. There was a similar dispute as to the rate of rent in the other suit.

The Munsif found that the plaintiff had failed to establish his case as to the rates of rent, and decreed the suits at the rates admitted by the defendant with cesses and damages. An application dated the 13th March 1900 filed by the plaintiff for the adjournment of the hearing of suit No. 482 of 1899 and for issue of warrants against his witnesses who had not appeared, was rejected by the Munsif.

The plaintiff appealed and contended before the Subordinate Judge (i) that the Munsif was wrong in rejecting the application filed by the plaintiff for issue of warrants against witnesses, (ii) that having regard to the provisions of section 150 of the

* Appeals from Appellate Decrees Nos. 1860 and 2354 of 1900 against the decree of Kali Kumar Bose, Subordinate Judge of Bhagalpore, dated Aug. 28, 1900, confirming the decree of Saroda Prosad Chatterjee, Munsif of Bhagalpore, dated March 29, 1900.

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Bengal Tenancy Act, the defence of the defendant as to the rates of rent should have been rejected by the Munsif as the admitted rent was not deposited, and so forth. With reference to the first contention, the Subordinate Judge held that in the circumstances of the case the application was rightly rejected by the Munsif. With regard to the provisions of section 150 of the Bengal Tenancy Act, the Subordinate Judge overruled the objection on the ground that as it was not taken before the Munsif by the plaintiff, he must have waived his right, and could not take it in appeal. The appeals were accordingly dismissed.

Dr. Ashutosh Mukerjee (Babu Lalmohan Ganguli and Babu Narendra Chandra Bose with him), for the appellant, contended that as the plaintiff admitted that money was due, unless he paid it into Court, the Court could not take cognisance of the plea, having regard to section 150 of the Bengal Tenancy Act.

[BANERJEE J. That section seems to be restricted to cases where the admission and the plea are of such character that if no evidence were given on either side, the plaintiff would be entitled to a decree for the whole amount.]

Then it would be necessary to read into the section words which are not to be found there. The Lower Appellate Court has also erred in law in holding that the plaintiff's application dated the 13th March 1900 was rightly rejected by the Munsif.

Babu Shib Chandra Palit, for the respondent, submitted that the section was only directory, and not imperative. The language of section 151 showed that this contention was correct. Further, section 150 only contemplated cases in which the burden of proof was on the tenant, that is to say, cases in which the defendant confessed the claim, but wanted to avoid the liability to pay.

BANERJEE J. The questions raised in these two appeals are two, namely, *first*, whether the Lower Appellate Court is right in law in holding that the First Court had good grounds for refusing the application of the plaintiff, dated the 13th of March 1900, for further process on his witnesses; and, *second*, whether the Court of Appeal below is right in holding that the first Court was justified in deciding the case without regard to the provisions of section 150 of the Bengal Tenancy Act.

Upon the first question the Lower Appellate Court says : " It is clear from the record that the plaintiff took four adjournments before to produce his witnesses who are his tenants in these cases. Without taking any steps on previous two or three occasions to have his witnesses produced, he made an application for issue of warrants against his tenant witnesses on the 13th March 1900, but that application was rightly rejected by the Lower Court." .

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I do not think that the Courts below were wrong in their view that the application for further process on his witnesses that was made by the plaintiff was rightly rejected. If the plaintiff had not used due diligence in the matter, and if he had not asked for the issue of further process at the earliest date, it cannot be said that the first Court did not exercise its judicial discretion properly in refusing the application for further process on the 13th March 1900. At any rate, I cannot, in second appeal, say that the Lower Appellate Court, in holding that the first Court was right in the course it took, committed any error of law for which we can interfere with its judgment.

On the second question, it is argued that the language of section 150 of the Bengal Tenancy Act is imperative and makes it obligatory on the Court to refuse to take cognisance of the defendant's plea, when the defendant admits that some money was due, and the plea is that the amount claimed is in excess of the amount due; and as the defendant in the present case admitted that some money was due, that is to say, that rent at the rate of nine rupees a year was due from 1303 to the date of the institution of the suit, the Court below was wrong in taking cognisance of the defendant's plea, that the rate at which rent was claimed was in excess of the rate at which rent was payable.

No doubt the defendant admitted in this case that rent at the rate of nine rupees annually was due from 1303 up to the date of suit, and the Court without recording any special reason in writing took cognisance of the plea that the rate at which rent was claimed was in excess of the rate at which it was payable. It not only permitted the defendant to cross-examine the witnesses called by the plaintiff in support of his claim, but allowed the defendant to give evidence to rebut that claim.

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But the question still remains whether the First Court acted in contravention of section 150 of the Bengal Tenancy Act. The Lower Appellate Court gets over the objection on the ground that as the plaintiff did not ask the Court to enforce the provisions of that section, the plaintiff must be taken to have waived his right to have the benefit of the section. I am not prepared to accept this view as correct. The section does not say that the plaintiff must ask the Court to enforce the section before the Court can be required to enforce the provisions of the section. Of course the omission of the plaintiff to call the attention of the Court to the section had this effect, namely, that it prevented the Court from recording special reasons in writing upon which it could take cognisance of the plea, notwithstanding that the amount admitted to be due was not deposited. It may also be said, now that the plea has been taken cognisance of and evidence has been gone into, that it would be too late to ask the Court to decide the case without taking cognisance of the plea, if it does not find any special reasons for dispensing with the provisions of the section against the taking of the plea. Be that as it may, I do not propose to base my judgment on any such narrow ground.

I am of opinion that, having regard to the nature of the objection raised in this case by the defendant, it must be held that it is one which is not covered by section 150 of the Bengal Tenancy Act. In my opinion, section 150 of the Bengal Tenancy Act is limited in its operation to those cases where the plea of the tenant is of a nature such that the burden of proving it rests upon the tenant, and in the absence of evidence on his side, the plaintiff would be entitled to a decree for the full amount; as for instance where the plea is in the nature of a plea of payment or a plea of exemption from liability to pay rent by reason of diluvion or by reason of partial eviction or for any other similar reason. Where, however, the plea is of a nature such that the real question involved in it must remain to be determined by the Court notwithstanding that the defendant's plea is disregarded, I am of opinion that the section was not intended to apply to such a case. No doubt the language of the section is not very happy; but the view I take seems to me to be the only reasonable view of its meaning and

intention, and the only view upon which it can work without leading to any anomaly. For where, as in the present case, the plea is that the amount claimed is in excess of the amount due by reason of the rent claimed to be annually payable being in excess of the amount that is really so payable, whether the defendant takes any plea objecting to the annual rate of rent or not, the burden must lie upon the plaintiff to prove that rent is payable at the rate claimed.

This the learned vakil for the appellant does not dispute, and indeed it cannot well be disputed. The mere fact of the defendant being honest enough to admit some rent to be due, cannot exonerate the plaintiff from the obligation that attaches to the plaintiff in a rent suit to prove that rent is payable at the rate claimed. Even if the case had been tried *ex-parte*, the plaintiff would have been bound to prove that. If that is so, what would be the effect of the Court's refusing to take cognisance of the defendant's plea that the rate claimed is not the correct rate, when, notwithstanding the absence of any such plea, the Court is still bound to go into the question involved in the plea? Could it then be said that the Court refuses to take cognisance of the plea, when it must call upon the plaintiff to prove the rate claimed, and it must determine what the rate is at which the rent is annually payable? Though it may nominally refuse to take cognisance of the plea, yet it really does enter into a trial and determination of the question involved in the plea. Unless then the section is construed in the limited sense in which I understand it, namely, that it is intended to apply only to those cases where the plea of the tenant is one in respect of which the burden of proof lies upon him, there is no refusal to take cognisance of the plea; and to give effect to the contention urged on behalf of the appellant that the section applied even to cases like the present, would lead to this anomalous result, that although the Court has to determine the question involved in the plea, it is nevertheless to refuse to take cognisance of the plea. Shortly stated, the section is intended to cover that class of cases where the plea is, in technical language, a plea of confession and avoidance. The grounds of avoidance not being made out, the plea of confession will be operative, and the plaintiff will be entitled to a decree

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without having to prove anything more. That is the view I take of the proper construction of the section, and in that view the Courts below were quite right in going into the question of the rate of rent without regard to the provisions of section 150 of the Bengal Tenancy Act.

The grounds urged before us both fail, and these two appeals must be dismissed with costs.

PARGITER J. I agree. I wish to add a few words why I come to the same conclusion regarding section 150 of the Bengal Tenancy Act. The section treats the defence as consisting of two parts,—an admission and a plea. The admission is that money is due; the plea is that the amount claimed is in excess of the amount due. The admission according to the words of the section is in general terms, simply—money is due. The plea is the part that modifies the admission; it is the plea that, read with the concluding words of the section, introduces precision and specifies the exact amount admitted to be due. If the defendant does not pay in that amount and the plea is struck out in consequence, there remains the admission in general terms that money is due, and the result thereupon would be that the plaintiff would be entitled to a decree for his claim. That seems to me to be the effect of the words as they stand in the section, if taken apart from the intention of the Legislature. But I do not think that the Legislature can have intended to place an honest defendant in a worse position than a dishonest one; for if the defendant denies the whole of the plaintiff's case, the plaintiff is put to proof of it, and the defendant secures time before he is obliged to pay up any part of the claim; whereas according to the above construction an honest defendant who admits part of the plaintiff's claim would have the whole of the claim decreed against him unless he pays in the admitted sum at once.

It appears to me, therefore, that the construction must be modified, and it must be modified in the sense in which it has been taken by my learned colleague.

Appeals dismissed.

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March, 4.

Mortgage—Transfer of Property Act (IV of 1882) ss. 96, 97—Civil Procedure Code (Act XIV of 1882) s. 295, prov. (c)—Sale-proceeds, surplus of—Prior mortgage—Contract Act (IX of 1872) s. 44—Contribution as between co-mortgagors—Interest to date of realisation, rate of.

If a mortgagee receives any money out of the surplus sale-proceeds of a share in the property mortgaged to him, sold in execution of a decree on a prior mortgage from some of the mortgagors to whom the share belonged and against whom the decree was obtained, he is bound to apply the money to the satisfaction of his mortgage debt only in case he receives it by virtue of his security and not otherwise, although the payment might be made to him by the said mortgagors in satisfaction of other debts due to him from them.

Johnson v. Bourns (1) followed.

The Court is quite competent to allow in a mortgage decree interest at the stipulated rate up to the actual date of realisation.

Rameswar Koer v. Mahomed Mehdi Hossain Khan (2) and *Maharaja of Bharatpur v. Rani Kanno Dei* (3) followed.

SECOND APPEAL by the plaintiff, Ganga Ram Marwari.

The plaintiff brought a suit for Rs. 4,851 on a mortgage bond dated the 31st October 1892. The suit was instituted on the 3rd February 1897, and it was alleged in the plaint that the defendants first party had executed the mortgage bond, on receipt of a loan of Rs. 1,865, in favour of the plaintiff, the property mortgaged being a 6½-anna share out of a 7-anna *putti* in mehal Arsand, bearing tauzi No. 4197, or that treating the *putti* as sixteen annas, the share mortgaged was 15 annas, 8 gandas, 2 cowries, 1 krant. It was further alleged that the whole *putti* had been leased out to one Lalit Narain Khaihari at the annual rent of

* Appeal from Appellate Decree No. 1329 of 1899, against the decree C. M. W. Brett, District Judge of Bhagulpore, dated March 3, 1899, modifying the decree of Nafar Chandra Bhatta, Subordinate Judge of that district, dated April 27, 1898.

(1) (1843) 2 Y. & C. Ch. 263.

(2) (1898) I. L. R. 26 Calc. 39; L. R. 25 I. A. 179.

(3) (1900) I. L. R. 23 All. 181; L. R. 28 I. A. 35.

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Rs. 500, and that although the lease provided that a portion of the rent was to be paid to the plaintiff in satisfaction of a part of the interest due on the mortgage, the plaintiff could not realise anything, the lessee having complained that he had been dispossessed from a portion of the land by some of the defendants. The other defendants were described as interested in the mortgaged property, and the plaintiff prayed for future interest according to the terms of the bond up to the date of realisation and for other reliefs.

The defendants put in different sets of written statements. Amongst other points, it was contended (i) that a fourth share in the *putti* had been mortgaged by the defendant Nand Kishore Singh and others in 1882 to one Zalim Chowdhry and another, upon which a suit had been brought on the 21st March 1892 and a mortgage decree obtained on the 31st May 1893; that in execution of that decree the said share was sold for Rs. 4,805 on the 3rd May 1897; that the plaintiff through his *mukhtear* withdrew the surplus sale-proceeds, amounting to Rs. 2,397-7, from the Court on behalf of the said judgment-debtors and appropriated the amount himself; and that in the circumstances he was bound to credit the sum towards satisfaction of the mortgage debt: and (ii) that the prescribed portion of the rent due from the lessee as aforesaid should be credited in part payment of the mortgage debt under the terms of the lease.

The learned Subordinate Judge gave the plaintiff a modified decree. With reference to the rent payable by the lessee of the property to the plaintiff, he held that under the terms of the lease the plaintiff must give credit for Rs. 222, the sum which the lessee was bound to pay to him for each of the five years at the end of each year. With reference to the plea as to the surplus sale-proceeds, he found that the sum was withdrawn by the defendants, Nand Kishore Singh and others, through the plaintiff's *mukhtear*, and it was wholly or in part made over to the plaintiff, who professed to receive it in satisfaction of another subsequent debt due to him from them, and he held that under the provisions of s. 97 of the Transfer of Property Act, the plaintiff was bound, as second mortgagee of the property sold, to take out the surplus sale-proceeds in satisfaction of his debt. He accordingly

held that a set-off should be allowed to the claim for Rs. 2,395-7. The decree allowed interest at the stipulated rate, *i.e.*, Rs. 2 per cent. per mensem, on the principal sum from the date of suit, and at the rate of 6 per cent. per annum on the rest from the date of the decree to the date of the sale.

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The plaintiff appealed to the District Judge who varied the decree as to costs and also as regards the surplus sale-proceeds aforesaid. In regard to the latter, he found that out of the sum withdrawn from the Court, the plaintiff accepted Rs. 1,318-14 in satisfaction of a money-debt due to him from the owners of the share sold. He did not think that the provisions of s. 97 of the Transfer of Property Act could apply to the case, but held that the plaintiff was in equity bound to apply the amount received by him as aforesaid to the satisfaction of his mortgage debt. With regard to the rent due under the lease, the learned District Judge saw no reason to differ from the finding of the Subordinate Judge that the plaintiff had in fact received the money, but omitted to credit in satisfaction of his mortgage debt.

Dr. Rask Behary Ghose, Babu Karuna Sindhu Mookerjee, and Dr. Ashutosh Mookerjee for the appellant.

Babu Amarendra Nath Chatterjee and Babu Makhan Lal for the respondents.

BAKERJEE AND HENDERSON JJ. In this appeal which arises out of a suit for money due upon a mortgage bond, three points have been raised for determination in the argument on behalf of the plaintiff-appellant,—

(i) whether the Court of appeal below was right in holding that a certain sum of money received by the mortgagee from some of the mortgagors should be applied to the satisfaction of the mortgage debt, merely because it was part of the surplus sale-proceeds of the share of a portion of the mortgaged property, namely, the share of the mortgagor defendants, who paid the money, notwithstanding that the payment had been made by them in satisfaction of other debts due from them to the mortgagee;

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(ii) whether the Court of appeal below was right in holding that certain rents received from the *mostajir* or lessee of the mortgagors should be applied in satisfaction of the mortgage debt; and

(iii) whether the Court of appeal below was right in not allowing interest at the stipulated rate up to the date of realization, or, at any rate, up to the date of payment fixed by the decree.

Upon the first point this is how the matter stands. A portion of the mortgaged property, namely, the share of Nand Kishore Singh and others, which had been previously mortgaged to a third party, was sold in execution of the mortgage decree obtained by him, the present plaintiff not being a party to that suit, as the mortgage in his favour was executed after the institution of the prior mortgagee's suit; and out of the surplus sale proceeds, namely, Rs. 2,335, a sum of Rs. 1,318 was paid by Nand Kishore Singh and others to the plaintiff in satisfaction of another debt due to him. This payment the learned Judge in the Court below has held should be applied in satisfaction of the mortgage debt; and the main ground of his decision is that section 97 of the Transfer of Property Act makes it imperative that surplus sale proceeds should be paid to any person proving himself interested in the property sold, that is, to any subsequent mortgagees, if there be any; and that being so, the plaintiff was entitled to apply this sum in satisfaction of the mortgage debt, and if he has not chosen to apply it in that way, he must be compelled to do so.

The learned vakil for the plaintiff-appellant contends that this view of the law is wrong. In the first place it is argued that section 97 of the Transfer of Property Act has no application to this case, as that section, as the context shows, applies only to cases under section 96, that is to cases in which the property sold is subject to a prior mortgage, which was not the case here.

On the other hand, the learned vakil for the respondents, the defendants Nos. 8 to 10 who are the contesting defendants, so far as this question is concerned, relies upon the case of *Padmanabh Bombshenvi v. Khemu Komar Naik*(1) as authority for holding

(1) (1893) 1. L. R. 18 Bom. 634.

that section 97 of the Transfer of Property Act may have application to a case like this. But be that as it may, section 295 of the Code of Civil Procedure, proviso (c), clause (3), would show that the plaintiff was entitled to claim the surplus sale proceeds in satisfaction of the mortgage debt due to him, and it is not disputed that he had that right. The question is whether, although he had that right, he was under an obligation to the defendants Nos. 8 to 10, or any of the co-mortgagors to apply for payment of the money to him and appropriate the surplus sale-proceeds in satisfaction of the mortgage debt. If he was not under any legal obligation to do so, although according to the highest moral standard he ought to have done so, it could not be said that the money should be applied to the satisfaction of the mortgage debt notwithstanding that it has already been appropriated in some other way. The only ground upon which it could be said that he was bound to apply for the money and to appropriate it in satisfaction of the mortgage debt was that he had the right, and that his not exercising the right might work to the prejudice of the co-mortgagors. But on the other hand if the respondent's contentions be given effect to, it might work to the prejudice of the mortgagors, out of the sale proceeds of whose property the payment is made, and might give their co-mortgagors an undue advantage; for the surplus may be more than their share of the mortgage debt and may exceed the whole of the mortgage debt itself, in which case the entire mortgage debt may be paid out of the surplus proceeds of the other mortgagors, the objecting co-mortgagors not having to pay a single pice. It may be said in answer that they would be liable in a suit for contribution by their co-mortgagors. But so may it be said, if the objecting co-mortgagors had not obtained any deduction of the mortgage debt out of the surplus sale-proceeds of their co-mortgagor's property, they may also obtain contribution from the latter. According to the law of this country, "Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor so released from responsibility to other joint promisor or promisors" (section 44 of the Indian Contract Act). If the release of

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one of several joint promisors does not affect the rights of the promisee as against the other promisors, the qualified release of a part of the mortgage security in favour of some of several joint mortgagors, resulting from the mortgagee not seeking to enforce his right as against any surplus sale-proceeds of such part when sold in satisfaction of a prior mortgage, ought not to affect the mortgagee's right.

Moreover, the observations of Vice-Chancellor Knight Bruce in *Johnson v. Bourne*(1) go to show that it is open to the mortgagee to forego his security if he has confidence in his debtor. Then, again, it should be observed that if any such obligation in the mortgage, as the respondent contends for, were to be inferred from the existence of his right to claim the surplus sale-proceeds, it would relate to the whole of the available surplus sale-proceeds, and not merely to the portion that may come to his hand, to which the Court of appeal below thinks it ought to be limited.

If there be any hardship to any of the co-mortgagors, it is always open to them, when entering into the mortgage contract, to insert a stipulation that the security, or its equivalent in money, if it should be converted into money by any enforced sale, should be primarily answerable for the mortgage debt, and that their personal liability should arise only in the event of the security, or its equivalent proving insufficient. There is no such stipulation in the mortgage deed in this case.

For all these reasons we are of opinion that the rule of law laid by the learned District Judge as the basis of his judgment, namely, that the moneys received by the mortgagee from certain of the mortgagors out of the surplus sale-proceeds of their share of the mortgaged property should be appropriated to the satisfaction of the mortgage debt merely because it was part of such surplus, notwithstanding that it had been paid in satisfaction of other debts, cannot be accepted as correct. But this does not dispose of the question. It remains to be considered whether the amount received had been received by the mortgagee by means of or by virtue of the security. If it was so received, it should be appropriated to the satisfaction of the mortgage debt. This is

(1) (1843) 2 Y. & C. Ch. 268, 277.

the rule laid down in the case of *Johnson v. Bourne*(1) just referred to, and it is in our opinion a just and equitable rule which ought to be followed.

The question remains then, was the sum of Rs. 1,318 received by means of or by virtue of the security? Upon this point the first Court in its judgment says at page 33 of the paper-book: "On the 4th June 1897, the defendants Nos. 8 to 10 made a petition to this Court stating that the plaintiff, in collusion with the defendants Nand Kishore Chowdhry and others, whose share was so sold, was not withdrawing that sum in part satisfaction of his dues under the bond (Exhibit I in suit); that an injunction should be issued against those defendants restraining those defendants from withdrawing that amount; the plaintiff should be required to take out that sum and a *robokari* should be sent to that Court not to pay out that sum to the defendants. That petition was shown to the plaintiff's pleader, who wrote the word 'object' on the petition. I fixed the 7th June for hearing that petition. On 5th June, however, those defendants applied through the plaintiff's *mukhtear* who is conducting the suit on his behalf to withdraw the money, and the money was withdrawn, and it was wholly or in part made over to the plaintiff who professes to have received it in satisfaction of another subsequent debt due to him from them." And this the Subordinate Judge characterises as "a piece of nasty dodge of the plaintiff." Now it should be borne in mind that the present suit was instituted on the 3rd of February 1897, and the application for payment of the money was made on the 5th of June following, through the plaintiff's *mukhtear* who was conducting the present suit; and if the money was paid in these circumstances upon an application being made by the plaintiff's *mukhtear*, it would follow that the money was received by virtue of the security, and the case will come within the rule laid down in *Johnson v. Bourne*(1) and the appropriation in part satisfaction of the security would be right. Upon this point, however, the Lower Appellate Court has neither expressly affirmed nor expressly negatived the finding of the first Court. What the learned District Judge in the Court of appeal below says is this:—"Money

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(1) (1843) 2 Y. & C. Ch. 268.

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was due to him (the plaintiff) from the proprietors of the share sold on a simple money bond. He allowed those persons to take out the sale proceeds and then accepted from them Rs. 1,318-14 in satisfaction of that debt. The Subordinate Judge stigmatizes this conduct as 'atrocious' and 'a nasty dodge,' and though perhaps the terms applied are a little too forcible, there can be no doubt that the plaintiff allowed the sale-proceeds to be withdrawn for his own advantage."

The learned vakil for the respondent contends that this negatives the first Court's finding. We are not prepared to accept this view as correct. It is true that the District Judge tones down the stringency of the remark as to the plaintiff's conduct, but that is done in a very qualified way. The learned Judge merely says that the strictures are "a little too forcible." That being so, we think that the case must go back to the Lower Appellate Court in order that it may determine whether the finding of the first Court upon this point in the passage of its judgment quoted above is correct. If it is, the conclusion arrived at by the Lower Appellate Court will stand. If it is not, the deduction of Rs. 1,318-14 allowed will have to be disallowed.

The second point as was practically conceded is concluded by the finding of fact arrived at by the Lower Appellate Court.

As to the third point the learned pleader for the respondent very properly conceded that upon the authority of the case of *Rameswar Koer v. Mahomed Mehdi Hossein Khan*(1) and the case of the *Maharaja of Bhartpur v. Rani Kanno Dei*(2) interest must be allowed at the stipulated rate up to the date of realization; but he contended that as the first Court did not allow that, and there was no appeal against the decree of the first Court on that point by the plaintiff, it was not open to the plaintiff to raise that question now. That no doubt is so, but as the decree of the Lower Appellate Court must, upon the first ground taken in this appeal, be set aside and the case sent back to that Court and a new decree will have to be made by the Lower Appellate Court after the remand; if that decree is not a mere re-affirmance of the decree already made, but is to be a different decree by reason of the

(1) (1898) I. L. R. 26 Calc. 39; L. R. 25 I. A. 179.

(2) (1900) I. L. R. 23 All. 181; L. R. 28 I. A. 35.

disallowance of the deduction of Rs. 1,318, in that case interest will have to be allowed at that stipulated rate up to the date of realization.

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The decree of the Lower Appellate Court is accordingly set aside and the case sent back to that Court to be disposed of with reference to the directions contained in this judgment. Costs will abide the result.

M. N. R.

Appeal allowed. Case remanded.

HARISH CHANDRA TEWARY

v.

CHANDPORE COMPANY, LIMITED.*

1903
March 25.

Execution of decree—Civil Procedure Code (Act XIV of 1882) ss. 234, 372—Decree for money—Limited Company, debts and liabilities of—Transfer of the properties of the Company to a third party—Dissolution of Limited Company—Legal representative.

A obtained a decree for money against a certain limited Company. The Company had sold all their properties to a third person who again sold his rights to another limited Company. On an application for execution of the decree against the latter Company, substituting them on the record as the legal representatives of the former Company on their dissolution:—

Held, that the decree could not be enforced against the latter Company, ss. 234 and 372 of the Code of Civil Procedure not being applicable to the present case.

APPEALS by the decree-holder, Harish Chandra Tewary.

These appeals arose out of two applications for execution of decrees. One Harish Chandra Tewary obtained two decrees for money, one dated the 18th April 1898, and the other the 18th June 1898, against the Patkabari Indigo Planting and Estates Company, Limited. The decree-holder alleged that this Company had, on the 28th November 1898, sold all their properties, with the liabilities, to Sir Seymour King, Bart., who again sold the said properties and debts to Chandpore Company, Limited, on the 29th November 1898. It was further alleged that the Patkabari

* Appeal from Original Order Nos. 160 and 161 of 1902 against the order of Jadu Nath Das, Subordinate Judge of Murshidabad, dated Jan. 25, 1902.

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Indigo Planting and Estates Company was dissolved in England on the 13th March 1900. Under these circumstances, the decree-holder applied to execute his decrees against the Chandpore Company, Limited, alleging that they were the legal representatives of the Patkabari Indigo Planting and Estates Company. The Chandpore Company objected to the execution against them mainly on the grounds that they were not the legal representatives of the Patkabari Indigo Planting Estates Company, Limited, and that under the purchases, as alleged by the decree-holder, they were not liable to pay these debts. The learned Subordinate Judge of Murshidabad allowed the objection, and rejected the petition for execution of the decree.

Dr. Ashutosh Mookerjee (Babu Tarak Nath Chuckerbutty with him), for the appellant. S. 372 of the Civil Procedure Code, which is applicable to a suit is also applicable to execution proceedings having reference to s. 647 of the Code. Even if s. 372 be held to be inapplicable to execution proceedings, the Court has power to make such a substitution: *Narendra Nath Pahari v. Bhupendra Narain Roy*(1). Assuming that the first Company had not ceased to exist, but its right and liabilities were transferred to the present Company, we had a right to proceed for execution against the present Company under s. 372 of the Civil Procedure Code. Question is whether Chandpore Company is the legal representative of the Patkabari Company. Execution proceedings are nothing but a continuation of the suit, and the word suit is not to be limited to the proceedings up to the decree: *Shyama Charan Mitter v. Debendra Nath Mukerjee*(2). Suit includes not only the execution proceedings, but even proceedings for setting aside a sale: *Monmohini Dasi v. Lakhinarain Chandra*(3). The case of *Goodall v. The Mussoorie Bank, Limited*(4), no doubt goes against my contention, but that case was decided before the explanation to s. 647 of the Code was added.

Babu Dwarka Nath Chuckerbutty for the respondent. S. 372 of the Code of Civil Procedure has no application to the present case. The tenure has been sold away, and now there is a personal decree only. It could not be said that there was a

(1) (1895) I. L. R. 23 Calc. 374, 391. (8) (1900) I. L. R. 28 Calc. 116.

(2) (1900) I. L. R. 27 Calc. 484, 486. (4) (1887) I. L. R. 10 All. 97.

devolution of property. The subject-matter of the suit was not property, and there was no transfer. There is no authority for saying that s. 372 of the Code is applicable to execution proceedings. It has been held in the case of *The Collector of Musaffarnagar v. Husaini Begam*(1) that s. 372 of the Code is not applicable to execution proceedings. Upon the facts stated in their petition, the decree-holders are not entitled to execute their decrees against my client: see *Dhuronidhur Sen v. The Agra Bank*(2). There is no appeal to this Court. S. 244 of the Code of Civil Procedure applies to any question in execution arising between the parties to the suit or their representatives, and my client has not been made a party, therefore s. 244 of the Code does not apply. Under s. 588, cl. (21) of the Code, orders disallowing objections under s. 372 have been made appealable, but an order declining to make an order under s. 372 is not appealable. The case of *Norendra Nath Pahari v. Bhupendra Narain Roy*(3) relied upon by the other side, is distinguishable from the present case; that was a case of mortgage which being an interest in property, it could be said that there was devolution.

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Dr. Ashutosh Mukerjee in reply.

MACLEAN C.J. There is no dispute as to the facts, which are accurately stated in the first portion of the judgment appealed against. I need not recapitulate them.

The question is whether the decrees can be enforced against the Chandpore Company, Limited, assuming that that Company took over the liabilities of the Patkabari Indigo Planting and Estates Company, and as the legal representatives or assignees from the latter Company. To effect this object, the decree-holder says that for the purpose of enabling him to execute the decree the question arises in the execution proceedings; he is entitled to proceed either under section 234 or 372 of the Code of Civil Procedure, and to have the Chandpore Company substituted in the execution proceedings in the place of the Indigo Company. I am clear that section 234 does not apply. We can

(1) (1895) I. L. R. 18 All. 86. (2) (1879) I. L. R. 5 Calc. 86.

(3) (1895) I. L. R. 23 Calc. 374.

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hardly say that here the judgment-debtor has died. We do not know whether before the Indigo Company was dissolved in England provision was made for the payment of its debts.

As regards section 372 I am at least doubtful whether it applies to execution proceedings. But assuming it does, the present case is not within it. That section applies to the "assignment, creation or devolution of any interest," which must, I think, mean interest in the property, the subject-matter of the suit. There was no such assignment here: if there were any assignment at all, it was of the liability of the Indigo Company to pay the decree holder's debt. This would not have been properly the subject of an assignment, nor the creation or devolution of an interest: if there were any such contract, it probably took the form of a covenant by the Chandpore Company, to pay the debts of the Indigo Company or to indemnify the latter against them. This does not appear to me to be the assignment, creation or devolution of an interest within the meaning of section 372.

The appeal is dismissed with costs. This decision covers appeal 161 which is also dismissed with costs.

STEVENS J. I concur.

Appeals dismissed.

S. C. G.

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May 21, 26;
June 16.

Hindu Law—Adoption—Power of widow to give a son in adoption—Authority to give in adoption.

According to Hindu law, a widow, even in the absence of any authority from her deceased husband, is competent to give one of her sons in adoption.

Sri Balusu Gurulingaswami v. Sri Balusu Rama Lakshamma(1), *Mhalsabai v. Vithoba Khandappa Gulve*(2), *Hurosoondree Dossee v. Chundermoney Dossee*(3), and *Tarini Charan Chowdhry v. Saroda Sundari Dasi*(4), referred to.

Rangubai v. Bhagirthibai(5) distinguished.

APPEAL by the plaintiff, Jogesh Chandra Banerjee.

This appeal arose out of an action brought by the plaintiff to recover possession of certain moveable and immoveable properties after having it declared that the defendant Kalikanta was not the legally adopted son of the plaintiff's maternal grandfather, Radha Krishna Ghosal; that the *sulehnama* dated 15th Chaitra 1284 B. S. (27th March 1878), and the decree of the High Court, dated 29th April 1878, were not binding upon him.

The plaintiff alleged that his maternal grandfather, Radha Krishna Ghosal, died in the month of Bhadra 1282 B. S. (August 1875), leaving him surviving as his heirs, his widow and his three daughters—Karunamayee Debi, Nriyaki Debi the plaintiff's mother, and Swarnomayi Debi, who was a childless widow when her father died; that the defendant No. 4, Kalikanta, was brought by Radha Krishna to his house, having purchased him at Calcutta; that the said defendant on the death of Radha Krishna took out a certificate under Act XXVII of 1870 to collect the debts due to

* Appeal from Original Decree No. 417 of 1900, against the decree of Upendra Nath Bose, Subordinate Judge of Dacca, dated July 23, 1900.

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| (1) (1899) I. L. R. 22 Mad. 398; | (3) (1863) Sev. Rep. 938. |
| L. R. 26 I. A. 113. | (4) (1869) 3 B. L. R. (A. C.) 145; |
| (2) (1862) 7 Bom. H. C. Appx. 26. | 11. W. R. 468, |
| (5) (1877) I. L. R. 2 Bom. 377. | |

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the estate left by Radha Krishna ; that thereupon his (the plaintiff's) mother, Nrityakali, brought a suit to nullify Kalikanta's claim as an adopted son of Radha Krishna, and obtained a decree on the 19th May 1877; that against that decree Kalikanta preferred an appeal to the High Court and made the plaintiff, who was a minor at that time, a party to that appeal under the guardianship of his mother; that his mother fraudulently in collusion with Kalikanta got the said appeal disposed of by a *sulehnama* dated the 15th Chaitra 1284 B. S. (27th March 1878); that he (the plaintiff) on attaining majority came to know that his mother, grandmother, and his mother's sister had fraudulently sold different properties to the defendants; that the defendant Kalikanta was not the legally adopted son of his maternal grandfather, inasmuch as Kalikanta was bought and was brought to the family within one year of the death of his father, and at a time when there was none competent to give him in adoption.

The defence was that the *sulehnama* was binding upon the plaintiff; that the suit was barred as *res judicata*; and that Kalikanta Ghosal was the legally adopted son of Radha Krishna Ghosal. It appeared that the *sulehnama* did not purport to have been sanctioned by the High Court on behalf of the minor.

The Court of first instance being of opinion that the *sulehnama* was binding upon the plaintiff, and that Kalikanta was the legally adopted son of Radha Krishna, dismissed the plaintiff's suit.

May 21, 26. *Babu Harendra Narayan Mitter* for the appellant contended that the adoption of Kalikanta was invalid, inasmuch as his natural mother had no authority from his deceased natural father to give him in adoption. The following passage from Vasistha was referred to:—"Let a woman neither give nor receive a son in adoption except with her husband's permission;" and *Sri Balusu Gurulingaswami v. Sri Balusu Rama Lakshamma* (1). The text of Vasistha being express and clear, the views of the authors of the Dattaka Mimansa and the Dattaka Chandrika, as deviating from such text, should not be accepted: see the remarks of the Judicial Committee in the case referred to above. The opinion of the

(1) (1899) I. I. R. 22 Mad. 398; L. R. 26 I. A. 113.

pundits accepted by the Saddar Dewany in the case of *Debee Dial v. Hur Hor Singh*(1) supports this contention: see also the remarks of Mr. Justice Markby in the case of *Manick Chunder Dutt v. Bhuggobutty Dosses*(2). Jagganath also supports this view: see Colebrook's Digest, vol. II, Book V, verse 272, p. 387.

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Dr. Ashutosh Mookerjee (*Babu Govind Chunder. Dey Roy* with him) for the respondent, contended that the question was concluded by the authorities against the appellant, and referred to the case of *Tarini Charan Chowdhry v. Suroda Sundari Dasi*(3), and also to Mayne's Hindu Law, 5th edition, para. 120, and G. C. Sarkar's Tagore Law Lectures (1888), p. 276.

Babu Harendra Narayan Mitter in reply.

Cur. adv. vult.

MACLEAN C.J. This is a suit to set aside the decree of this Court dated the 29th of April 1878, as null and void as against the plaintiff; to have it declared that the defendant No. 4 was not the duly adopted son of one Radha Krishna Ghosal, for a declaration that the plaintiff is the sole heir of the latter, and for consequential relief.

June 16.

Three questions arise for decision: (i) Is the above decree binding on the plaintiff, (ii) Whether in fact there was an adoption of defendant No. 4, (iii) Whether his mother could validly give him in adoption.

A short history of the case is this: Radha Krishna Ghosal died in September 1875, leaving a wife, one Janaki Debi, and three daughters—Karunamayi Debi, (defendant No. 1), Nriya-Kali Debi (defendant No. 2), whose son is the present plaintiff, and Swarnomayi Debi who was a childless widow and who is now dead. In 1876 the defendant No. 4 who was alleged to have been adopted by Radha Krishna in 1863, and claiming to be the adopted son of Radha Krishna Ghosal, applied for a certificate under the Succession Certificate Act, in relation to the

(1) (1882) 4 S. D. R. 320.

(2) (1878) I. L. R. 3 Calc. 443, 451.

(3) (1869) 3 B. L. R. (A. C.) 145; 11 W. R. 468.

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estate of his adoptive father and obtained it. On the 24th of July 1876, the daughter Nritya Kali, defendant No. 2 in this suit, instituted a suit to set aside the adoption, and, in her plaint, she described herself as "Sreemati Nritya Kali Debi, wife of Nabin Chandra Bandopadhyaya, mother and guardian of Jogesh Chandra Bandopadhyaya, the plaintiff." On the 19th of May 1877 a decree was made in that suit by the Second Subordinate Judge of Dacca, who set aside the adoption. In the judgment in that suit, it was held that the plaintiff was suing on her own behalf and not on behalf of the present plaintiff. There was an appeal to the High Court, and, on the 29th April 1878, the defendant No. 2 in the present suit presented a petition for herself, and as mother and guardian of the present plaintiff, for the compromise of the suit upon the terms which had been agreed upon by a *Sulehnamah* dated the 28th of March 1878. The petitioner asks that it might be declared, agreeably to the terms of the *Sulehnamah*, that the adoption of the defendant No. 4 was valid; and, under the compromise, the property of Radha Krishna Ghosal was divided between the defendant No. 4, the widow of Radha Krishna and his three daughters whom I have named, in certain shares. So far as the *Sulehnamah* goes, there is nothing to show that the defendant No. 2 was purporting to act for her son, the present plaintiff.

On the 29th of April 1878, a decree was made in the High Court in accordance with the terms of the compromise, purporting to be a consent decree, and, under it, the defendant No. 4 was declared to be the adopted son of Radha Krishna Ghosal. In the *Muktearnamah* dated the 24th of Magh 1284, the defendant No. 2 does not purport to act for her son, the present plaintiff. At this time the father of the plaintiff was alive, and the mother was neither his natural nor his certificated guardian, and no order was made in the suit making the present plaintiff a party, and the compromise does not purport to have been sanctioned by the Court on his behalf. Under these circumstances the plaintiff contends that he was not a party to that suit; and that the compromise decree is not binding upon him. This contention must prevail. In any event the compromise was not sanctioned on his behalf by the Court.

The next question is whether in point of fact there was an adoption. The adoption is alleged to have taken place in 1863, and, Radha Krishna died in 1875, and, there can be no question that for the whole of that period, twelve or thirteen years, he acknowledged and treated the defendant No. 4 as his adopted son. The Court below has found in favour of the adoption.

It is urged for the plaintiff that there was no valid adoption because the requisite ceremonies were not performed. There is no doubt that Radha Krishna was anxious to adopt a son; that he went from the country to Calcutta for the purpose of finding a son for adoption if he could, and that he went back to the country with a boy, the defendant No. 4. It appears that the defendants Nos. 2 and 4 have parted with all the properties, they severally obtained under the compromise, and, that there is strong ground for suspecting that they are now making common cause with the plaintiff against the present defendants who are *bonâ fide* purchasers for value from them. There can be no doubt that in 1863 there was a public giving and taking in Calcutta; and, if the evidence of Krishna Dhone Chatali is to be believed,—and the Court below has believed him,—and of Kali Krishna Chuckerbutty, there can be no doubt that the ceremonial rights in connection with the adoption were duly performed: and there can be no doubt that when the defendant No. 4 was married, Radha Krishna treated him as his adopted son. The defendants who are *bonâ fide* purchasers for value under deeds, some of which are attested by the plaintiff himself, are in a difficulty, being strangers, in proving the fact of the adoption. But upon the evidence I have referred to, a strong presumption arises in favour of the fact of the adoption, a presumption which, to my mind, the plaintiff has not been able to rebut. As against the adoption it was urged that, by reason of the death of the natural father of the defendant No. 4 within one year from the date of the adoption, the boy adopted was in a condition of *impurity* and therefore could not be validly adopted. But as to this, there is really no evidence; and, it is conceded by the appellant that there is no evidence to support this part of the case.

Then it was urged that the boy was really purchased by Radha Krishna, and, that he gave the mother Rs. 700 for him.

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According to the evidence of the plaintiff's witness, Ishwar Chandra Chakravarti, this was done openly. It is almost idle to suppose that this could have happened, and, that Radha Krishna who was anxious to adopt, should, at the same time openly, do an act which would invalidate the adoption. I do not think we can give any credence to this part of the case. There is no doubt that in connection with the adoption, a deed of gift was executed in January 1863; and, according to the evidence of Ishwar Chandra Chakravarti, one of the plaintiff's witnesses, the deed of gift is in the possession of the defendant No. 2, the mother of the plaintiff. He says:—"I saw that deed of gift with Nriyakali. She has got the deed of gift with her." The defendants have put in an authenticated copy of this deed, but it is, perhaps, questionable whether that was properly admissible in evidence. I think it is proved that there was a public giving and taking and that the defendant's witnesses, Kali Krishna Chakravarti and Nanda Kumar Ghosal, prove that the requisite ceremonies were duly performed. The letter from the plaintiff's father of the 1st of Assin 1282 (Exhibit A4) shows that he, at any rate, regarded the defendant No. 4 as the adopted son of Radha Krishna. The fact of the adoption and that all the requisite ceremonies were performed has been substantiated by the evidence, which also shows that Radha Krishna throughout treated the defendant No. 4 as his adopted son, and that he was always so treated by relations and neighbours.

The last point is that the mother of the defendant No. 4 had no authority from her predeceased husband to give the defendant No. 4 in adoption to the Radha Krishna, and that, without such authority, it was not open to her, according to Hindu Law, to do so. The boy was one of three sons. The deed of gift, had it been produced, might, perhaps, have thrown some light upon this question of authority, but, in its absence, there appears to be no evidence that any such authority was expressly given. But it is contended for the defendants, that, in the absence of any such direct authority it was competent for the mother, after the death of her husband, according to Hindu Law, to give one of her sons in adoption. It is laid down by text-writers of authority, whose opinion is entitled to much consideration, that a wife

may give away her son in adoption after her husband's death, or when he is permanently absent, as, for instance, an emigrant, or has entered a religious order, or has lost his reason, provided the husband was legally competent to give away his son, and has not expressly prohibited his being adopted (see Mayne's Hindu Law, 5th Edition, paragraph 120). There is no suggestion of prohibition in the present case. The same view is taken by a very learned author, Babu Golap Chandra Sarcar, in his Tagore Law Lectures of 1888, on the subject of "The Hindu Law of Adoption," p. 276. The weight of authority to be given to the views of recent text-writers has been considered by the Judicial Committee of the Privy Council in the case of *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma*(1), at p. 427, and I only refer to the views of the writers I have mentioned subject to that criticism. In the Mitakshara section 11, sub-section 9, it is stated: "He who is given by his mother with her husband's consent while her husband is absent [or incapable though present] or [without his assent] after her husband's decease . . . becomes his given son." So Manu declares:—

"He is called a son given, whom his father or mother affectionately gives as a son, being alike (by class) and in a time of distress."

The disjunctive particle would appear to imply that after the husband's death the widow could give a son in adoption without his express authority. The decision in the case of *Mhalsabai v. Vithoba Khandappa Gulve*(2) supports this view, as also that in *Hurosoondree Dossee v. Chundermoney Dossee*(3).

The observations of the Court in the case of *Tarini Charan Chowdhry v. Saroda Sundari Dasi*(4) may also be referred to. The case of *Rangubai v. Bhagirthibai*(5) dealt with the case of the giving in adoption by a wife, whilst her husband was alive, and without his assent, which is not the case we are

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(3) (1863) Sev. Rep. 938.

(4) (1869) 3 B. L. R. (A.C.) 145;

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now considering. Referring for a moment to the authority of Dattaka Mimansa, section 4, Articles 10-12, and to Dattaka Chandrika, section 10, Articles 31 to 32, the same view is expressed though, in referring to these authorities, their views, so far as they deviate from or add to the *Smritis*, are to be accepted with caution [see per Privy Council in *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma*(1). The appellant, however, lays great stress on the precepts of Vasishtha, which, according to the Judicial Committee of the Privy Council, in the case I have just cited, are beyond dispute, but the meaning of which is open to various interpretations which must be determined by ordinary processes of reasoning. The precepts are as follows:—

“(i) Man formed of uterine blood and virile seed proceeds from his mother and his father as an effect from its cause.

(ii) Therefore the father and the mother have power to give to sell and to abandon their son.

(iii) But let him not give or receive in adoption an only son.

(iv) For he must remain to continue the line of ancestors.

(v) Let a woman neither give nor receive a son except with her husband's permission.”

In the same case it was also held that the rule that a wife's power to adopt, or to give in adoption an only son, at least with the concurrence of the *Sapindas* in cases when that is required, is co-extensive with that of her husband, is most consistent with principle.

The appellant relies principally upon the precept:—“Let a woman neither give nor receive a son except with her husband's permission.” But if the precept No. (iii) as to the adoption of an only son may be read as monitory and not mandatory, it is difficult to see why the precept, now under discussion, cannot be so read with the superadded reasoning that precept No. (v) may be reasonably interpreted as meaning that the giving in adoption by the wife is not to be effected without the husband's permission, if the situation be such that he can give such permission. If he were dead, he could not give such permission, at the immediate date of the giving in adoption.

(1) (1899) I. L. R. 22 Mad. 398; L. R. 26 I. A. 113.

In my opinion, the weight of the precepts and of the authorities is in favour of the view that the mother had power to give her son in adoption, and that the adoption was valid.

The appeal, therefore, fails and must be dismissed with costs.

GHIDT J. I concur.

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Appeal dismissed.

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Lunatic—Management of lunatic's estate—Custody of lunatic's person—Lunacy Act (XXXV of 1858) ss. 7, 9.

Under s. 9 of the Lunacy Act (XXXV of 1858) it is incumbent upon a District Judge to appoint a manager of the estate of a person adjudged to be of unsound mind.

If a lunatic be well taken care of by his own people at home, he should not be forced to go to a lunatic asylum, there being apparently no provision in the Lunacy Act authorizing a District Judge to send such a person to the asylum.

APPEAL by Musammat Joga Koer.

The appellant, the widow of Jaiwanti Sahu, applied to the District Judge of Arrah on the 1st March 1902 for the grant of a certificate of guardianship of her son, Rajendra Prosad Sahu, aged 32 years, on the ground that he had been imbecile for about two months. The property of the imbecile was worth about Rs. 31,993, and was within the jurisdiction of the District Court. The petition further stated that the property and person of the said imbecile had been under her management. A certificate from the Assistant Surgeon of Dumraon was filed with the petition, stating that the said Rajendra Prosad was of unsound mind.

On the 18th April, 1902, the District Judge ordered that the imbecile be sent to the Patna lunatic asylum, and added that upon this being done, the petition would be granted. Joga Koer, on the 25th April 1902, filed another petition stating that her son, Rajendra, was residing in his family house at Dumraon, and was

* Appeal from Order No. 248 of 1902, against the Order of H. R. H. Cox, District Judge of Shahabad, dated May 15, 1902.

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under the treatment of a doctor, and that under these circumstances it would be difficult to take him to the Patna lunatic asylum; that the zemindary being large and the mahajani business extensive, the estate would suffer for want of a certificate of guardianship, and she prayed that the order dated the 18th April be not be carried out, but that a certificate of guardianship as well as the management of the lunatic's property be granted to her. She further stated in her petition that, if the Court so desired, she would produce the lunatic before it. On the 29th April 1902, the District Judge refused this application, and on the 15th May 1902 passed a further order as follows: "Orders not obeyed. Application refused."

From that order Joga Koer preferred this appeal.

Babu Promatha Nath Sen for the appellant.

GHOSE AND PRATT JJ. This is an appeal against an order of the District Judge of Shahabad dismissing an application made by one Musammat Joga Koer, mother of Rajendra Prosad Sahu. This individual was described in the application presented by Joga Koer to be a lunatic, and the lady asked that she might be appointed guardian of the person and manager of the estate belonging to the lunatic under Act XXXV of 1858. The application was accompanied by a certificate from the Assistant Surgeon of Dumraon, stating that Rajendra Prosad Sahu was suffering from unsoundness of mind and was under his treatment, and that he was unfit to attend to his business. The District Judge apparently took it for granted that Rajendra Prosad was a lunatic, and expressed an opinion (that opinion being recorded on the 18th April 1902) that Rajendra Prosad being well off, his property should be devoted, first of all, to his welfare; and he directed that the lunatic be sent to the Patna lunatic asylum, where he would be properly looked after, and perhaps cured. And the learned Judge added as follows:—"When this has been done this petition will be granted. Put this up on the 15th May if nothing further has been done by them." On the 25th April 1902, a petition was presented to the District Judge by Musammat Joga Koer, stating that Rajendra Prosad was residing in his family house at Dumraon

and had been put under the treatment of the medical officer there ; that he was the only male member in the family, and that it would be difficult to take him to Patna and put him under medical treatment there, and further, that the zemindary being large and the mahajani business being extensive, the estate would suffer for want of a certificate of guardianship ; and she prayed that the order made by him (the District Judge) on the 18th April be not carried out, and that a certificate of guardianship be granted to her. She stated at the same time that she was willing to produce the lunatic before the Judge, if so required. On the 29th April 1902, the Judge recorded the following order :—"The petition to excuse the lunatic being sent to Patna put in—Refused,"—and this was followed by another order, which was on the 15th May 1902 :—"Orders not obeyed. Application refused." The result is that no manager in respect of the estate of the lunatic has been appointed, and the lunatic has been ordered to be sent to the lunatic asylum at Patna.

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Section 9 of Act XXXV of 1858 runs as follows :—"When a person has been adjudged to be of unsound mind and incapable of managing his affairs, if the estate of such person or any part thereof consists of property which by the law in force in any Presidency subjects the proprietor, if disqualified, to the superintendence of the Court of Wards, the Court of Wards shall be authorized to take charge of the same. In all other cases, except as otherwise hereinafter provided, the Civil Court shall appoint a manager of the estate. Any near relative of the lunatic or the public curator, or if there be no public curator, any other suitable person, may be appointed manager." So that, if a person be adjudged to be of unsound mind, and incapable of managing his own affairs, it is incumbent upon the District Judge to appoint a manager of the estate belonging to such person. In the present case, the District Judge has simply passed the order that Rajendra Pershad Shahu, the lunatic, be sent to the Patna lunatic asylum. And he has refused the application made by the mother of the lunatic apparently without any consideration, whether it was incumbent upon him to appoint a manager to the estate belonging to the said lunatic. Referring to the order which he made on the 18th April 1902, it would appear that

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the Judge meant to reserve the question of the appointment of a manager to the estate of the lunatic, pending the treatment which he desired the lunatic should be put under at the Patna lunatic asylum. For aught we know, the lunatic might have to be detained for the purpose of treatment for some years together; and we do not understand whether the learned Judge seriously meant that all this while the estate of the lunatic should be left uncared for, and without a manager.

We observe that the learned District Judge, although some evidence was produced before him as to the unsoundness of mind of Rajendra Pershad, has not determined whether that person is a lunatic, as he was bound to do under Act XXXV of 1858 (see section 7), and it is necessary that this should now be done.

Turning then to the question whether Rajendra Pershad should be sent to the lunatic asylum, we observe that there is apparently no provision in Act XXXV of 1858 authorising a District Judge to send a person adjudged to be a lunatic to the lunatic asylum; but it is not necessary in the view that we take of the matter to express any decisive opinion upon the point at the present stage. Rajendra Pershad is evidently a man of means. According to the statements made by his mother, he has been residing at Patna with his family, and been under medical treatment there; and, if he is not absolutely violent, and may be well taken care of by his own people at Dumraon, and can get proper medical treatment at that place, there is no reason why he should be forced to go to the lunatic asylum. We think that the District Judge should reconsider this matter before he makes up his mind to take the step which he intended to take by his order of the 18th April 1902.

We need hardly add that, in any event, it would be incumbent upon the District Judge, in view of the provisions of section 9 of Act XXXV of 1858, to appoint a manager to take charge of the estate of Rajendra Shahu, and he will now be required to appoint a person as manager. If the mother be a fit and proper person, we do not see why she should not be so appointed.

With these remarks the orders of the District Judge of the 18th April 1902 and 15th May 1902 will be set aside and the case sent back to him for reconsideration with reference to the

remarks which we have already made. The learned Judge is requested to take up this matter, if possible, out of turn.

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Appeal allowed. Case remanded.

AMIRUDDI BEPARI

v.

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April 16.

BAHADOOR KHAN.*

Notice of dishonour—Negotiable Instruments Act (XXVI of 1881), ss. 30, 93, 98—Hundi—Liability of drawer.

In order to make the drawer of a *hundi* liable in case of dishonour by the drawee or acceptor thereof, it is necessary for the plaintiff to show that due notice of dishonour was given to the drawer, or that he (the drawer) did not suffer any damage for want of such a notice.

Krishnashet Bin Ganshet Shetye v. Hari Valji Bhatye (1) and *Moti Lal v. Moti Lal* (2) referred to.

SECOND APPEAL by the plaintiffs, Amiruddi Bepari and others.

This appeal arose out of an action for a certain sum of money based on a *hundi*. The allegation of the plaintiffs was that the *hundi* was executed in favour of one Yanus Bepari by defendant No. 2, and which was accepted by defendant No. 1; that the said Yanus Bepari had an eight-anna share of the *hundi*, and the plaintiffs Nos. 1 and 2 had the remaining eight annas; that the said Yanus Bepari died, leaving him surviving two sons, plaintiffs Nos. 4 and 5, the *pro formâ* defendants Abdul Rahman and others, and a daughter named Nurbanu Bibi, as heirs; that the *pro formâ* defendants and the said Nurbanu Bibi sold their share in the *hundi* to the plaintiff No. 3; that the said *hundi* was presented to the defendant No. 1 for acceptance, who accepted it promising to pay the amount; but he did not do so, and hence the suit. The defendant No. 2 alleged that he had no notice of the transfer,

* Appeal from Appellate Decree No. 2155 of 1900 against the decree of Mohim Chunder Ghose, Subordinate Judge of Dacca, dated June 21, 1900, affirming the decree of Upendra Nath Dutt, Munsif of that District, dated Jan. 28, 1900.

(1) (1895) I. L. R. 20 Bom. 488.

(2) (1893) I. L. R. 6 All. 78.

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nor any demand was made from him of the amount under claim; and that he was not liable inasmuch as the defendant No. 1 had accepted the *hundi*.

The Court of First Instance decreed the plaintiff's suit as against the defendant No. 1, but dismissed it as against the defendant No. 2, the drawer of the *hundi*. Against this decision the plaintiffs appealed to the Subordinate Judge of Dacca, who dismissed the appeal, holding that in order to make the defendant No. 2 liable, it was necessary to serve him with a notice of dishonour.

Moulvi Shamsul Huda, for the appellants, contended that no notice was necessary. If any notice was necessary at all, it was for the defendant No. 2 to show that no notice was served upon him, and that he suffered damage for want of such notice.

Babu Sarat Chandra Basak, for the respondents, was not called upon.

RAMPINI AND MITRA JJ. This is an appeal against the decision of the Subordinate Judge of Dacca dated the 21st of June 1900. The suit was one brought upon a *hundi*; and the Subordinate Judge has given the plaintiff a decree against the defendant No. 1, the acceptor of the *hundi*, and dismissed the suit as against the defendant No. 2, the drawer of the *hundi*, on the ground that the plaintiff did not give him any notice of dishonour. Plaintiff now appeals against the decision.

The learned pleader for the appellant argues that it was not necessary to give notice, because the defendant has not shown that he has suffered any damage for want of notice. We think, however, that it is plain from the terms of sections 30 and 93 of the Negotiable Instruments Act that notice was absolutely necessary to give the plaintiff a cause of action, and notice can only be dispensed with under the circumstances mentioned in section 98 of that Act. The plaintiff has not shown that any of the circumstances mentioned in section 98 exists. Therefore, we think that the suit was rightly dismissed.

We are supported in this conclusion by the rulings in the cases of *Krishnashet v. Hari Valji Bhatye* (1) and *Moti Lal v. Moti*

(1) (1895) I. L. R. 20 Bom. 488.

Lal(1). It is for the plaintiff to show that notice was given, or that the defendant could not suffer damage for want of it. It was not for the defendant to show that he had suffered damage for want of notice. As a matter of fact, the defendant raised in his written statement the plea that he had received no notice, so it lay upon the plaintiff to shew that the defendant could not suffer any damage for want of notice. But he has not done so.

The appeal is dismissed with costs.

S. C. G.

Appeal dismissed.

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v.
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ORIGINAL CIVIL.

MONOHAR DAS

v.

FUTTEH CHAND.*

1903
July 13.

*Revivor—Execution of Decree—Limitation Act (XV of 1877), Sch. II, Art. 180—
Notice—Civil Procedure Code (Act XIV of 1882), ss. 232, 248.*

Where a notice was issued under ss. 232 and 248 of the Civil Procedure Code for the execution of a decree and further proceedings were dropped until after the period allowed by limitation computed from the date of such decree:—

Held, that there being no order made by the Court such notice alone did not operate as a revivor of the decree within the meaning of Art. 180, Sch. II of the Limitation Act.

Ashootosh Dutt v. Doorga Churn Chatterjee(1) and *Suja Hossein v. Monohar Das* (2) discussed.

THIS was an application for the execution of a decree made on the 12th of December 1889.

It appeared that the plaintiff who obtained the decree died in March 1896 without ever having applied for execution. His executrix, Dhundaye Bibi, died in March 1901, also without having applied for execution.

* Application in Original Civil Suit No. 474 of 1889.

(1) (1888) I. L. R. 6 All. 78.

(2) (1880) I. L. R. 6 Calc. 504.

(3) (1896) I. L. R. 24 Calc. 244.

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On the 12th of December 1901, precisely 12 years after the date of the decree, Jamna Daye Bibi, sole heiress of the said Dhundaye Bibi, obtained an order for Letters of Administration to the estate of Dhundaye Bibi, and at the same time applied for execution of the decree of the 12th of December 1889.

Notice was ordered to issue in respect of her application for execution under ss. 232 and 248 of the Code of Civil Procedure.

After the notice had issued Jamna Daye Bibi died, and further proceedings were dropped.

Mr. Dunne (*Mr. Sinha* with him), in support of the application, contended that the order for notice to issue under ss. 232 and 248 of the Code of Civil Procedure constituted a sufficient revivor within the meaning of Article 180 of the second Schedule of the Limitation Act (XV of 1877).

Mr. Chakravarti (*Mr. B. C. Mitter* with him) *contra*. A notice for an order to issue is not a revivor. When followed by an order then it is a revivor, and the date of the order gives a fresh starting point from which limitation may run: see *Ashootosh Dutt v. Doorga Churn Chatterjee*(1), *Tincourie Dawn v. Debendro Nath Mookerjee*(2), *Futteh Narain Chowdhry v. Chundrabati Chowdhraim*(3). Time which has begun to run cannot be suspended by death: *Suja Hossein v. Monohar Das*(4). An application for transmission is not an application for the execution of decree within s. 230 of the Code of Civil Procedure: *Nilmony Singh Deo v. Biressur Banerjee*(5).

Mr. Dunne in reply. The cases cited do not deal with this point which is an entirely new one. In each of the cases cited there had been an order; here there was none. An application for transmission is not one for execution, but it has been held that an application for transmission is a revivor within Art. 180 of the Limitation Act: see *Suja Hossein v. Monohar Das*(4), which shows there was no need for an order for execution. The Code does not limit revivor to an order—a notice suffices. It must be the date of my application that counts. If an order keeps the decree alive, why should not a notice?

(1) (1880) I. L. R. 6 Calc. 504. (3) (1892) I. L. R. 20 Calc. 551.

(2) (1890) I. L. R. 17 Calc. 491. (4) (1896) I. L. R. 24 Calc. 244.

(5) (1889) I. L. R. 16 Calc. 744.

HARINGTON J. This is an application for the execution of a decree made on the 12th of December 1889.

The plaintiff who obtained the decree died on the 21st of March 1896, leaving Dhundaye Bibi his executrix. She died on the 21st of March 1901, leaving Jamna Daye Bibi her sole heiress.

On the 12th of December 1901, precisely 12 years after the date of the making of the decree, Jamna Daye applied for execution. She had not obtained Letters of Administration : her application was therefore refused, but she applied for Letters of Administration on the same day, and the order was made that Letters of Administration should issue to her, whereupon she renewed the application for execution of the decree of the 12th of December 1889, and notice was ordered to issue under sections 232 and 248 of the Civil Procedure Code.

After notices had issued she died, and no order was made for the execution of the decree. Owing to her death, proceedings were dropped.

On behalf of the judgment-debtor it is urged that this application is barred by limitation.

By Article 180 of the Limitation Act it is provided that the decree must be enforced within 12 years of the making of it unless there has been a revivor or part payment of interest or principal due under the decree or an acknowledgment by the person liable under the decree.

On the part of the applicant it is contended that there has been a revivor created by the application made on the 12th of December 1901, and by the notice issued thereunder.

The case of *Ashootosh Dutt v. Doorga Churn Chatterjee* (1) and several cases were cited in support of the proposition that an order for execution operates as a revivor, but it is unnecessary to examine these cases because in the present case there is no order for execution. There is no authority for the proposition that the fact that an application has been made and notices have been issued to the judgment-debtor under sections 232 and 248 of the Civil Procedure Code, creates a revivor of the decree.

The principle on which an order for execution operates as a revivor is found in the judgment delivered in the case of *Suja*

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Hossein v. Monohar Das(1), which is based on the ground that the order is made after notice on the judgment-debtor to show cause, and after hearing both parties if they desired to be heard. The order made gives a right to execute the decree, and from that fresh starting point the time must run. It thus operates as a revivor of the right to execute the decree.

In the present case the Court has made no order between the parties deciding the question whether there is a right to execute the decree, as the proceedings were dropped before any order was made.

There being no order, there is no revivor.

The applicant has failed to shew that the time to execute the decree has been extended by revivor but he has alleged an acknowledgment in writing which has been denied by the judgment debtor.

The case will be set down, if the parties so desire it, for the trial of the issue as to whether an acknowledgment sufficient to take the case out of the Limitation Act has or has not been given.

I reserve the costs.

Attorney for the plaintiff : *H. H. Remfry.*

Attorney for the defendant : *Subodh Chunder Mitter.*

J. E. G.

(1) (1896) I. L. R. 24 Calc. 244.

TESTAMENTARY JURISDICTION.

KADAMBINI DASSI

v.

KUMUDINI DASSI.*

1908

July 16.

Evidence—Relevant fact—Evidence Act (X of 1872), s. 10—Conspiracy, evidence of—Statements by an alleged conspirator to a third party, relevancy of.

Statements made by an alleged conspirator to a third party suggesting that there had been a conspiracy between the plaintiff and others in connection with the forgery of an alleged will, are not relevant when such statements are used to prove (a) the existence of a conspiracy as to which there is no issue, or (b) that the plaintiff was a party to it.

On the 25th May 1902 Gopal Lal Seal, a wealthy inhabitant of Calcutta, died at Chandernagore, leaving him surviving his two widows, Kumudini Dassi and Nayan Manjari Dassi, and his mother, Kadambini Dassi. Two months after Gopal Lal Seal's death, his mother Kadambini and one Nogendra Nath Mitter applied to the High Court for grant of probate of a will alleged to have been executed by the said Gopal Lal Seal. To this application both the widows of the deceased entered caveats, alleging that the deceased died intestate, and that the will propounded was a forgery. Subsequently, and prior to the hearing of this suit, Kadambini died, and the suit was proceeded with on behalf of the surviving plaintiff, Nogendra Nath Mitter.

At the hearing of this suit, and while one Shoshi Shekhar Banerjee, a witness on behalf of the younger widow Nayan Manjari, was under examination, it was proposed by her counsel to tender in evidence two statements alleged to have been made to the witness, Shoshi Shekhar, by a third party named Satish Chunder Mukerjee.

The Offg. Advocate-General (Mr. Pugh), Mr. J. G. Woodroffe and Mr. J. N. Banerjee for Nayan Manjari. We are entitled to

* Original Suit No. 11 of 1902.

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tender these two statements in evidence, they being relevant under s. 10 of the Evidence Act. All the authorities are in favour of the view we take.

Mr. Jackson (*Mr. Sinha* and *Mr. Falkner* with him) for Kumudini Dassi. I support the contention of the learned Advocate-General and submit that the wording of s. 10 not being "in furtherance" (as in the English law), but "in reference," the statements are relevant under that section of the Evidence Act: Cunningham's Evidence Act, 9th edition, p. 101; Field's Evidence Act, 5th edition, s. 10; and Whitley Stoke's Evidence Act, s. 10, referred to.

Mr. Chakravarti (*Mr. Garth*, *Mr. Chaudhuri*, *Mr. Knight* and *Mr. Seal* with him) for the plaintiff, Nogendra Nath Mitter. Whether the wording of s. 10 of the Evidence Act is "in furtherance" or "in reference," that must be in reference to the common intention. It is impossible to suggest, where one or two persons make a statement, that such statement can be said to be either 'in furtherance' or 'in reference' to a common intention: see Ameer Ali and Woodroffe's Evidence Act, 2nd edition, pp. 81, 82; Phipson's Evidence, p. 73; and Taylor on Evidence, p. 593. In effect, s. 10 is a reproduction of the English Law. You cannot rely on a statement that is merely tendered and not proved. There is no tangible evidence to show that Nogendra is a conspirator with Satish. There has been a mere suggestion of conspiracy, but there is no proof; and, moreover, the suggestion is denied. There is absolutely no sworn testimony to that effect. The Court will have to be satisfied that Nogendra conspired with others.

The Offg. Advocate-General in reply. The other side have omitted to refer to the Indian Law in Ameer Ali and Woodroffe's Evidence Act. Both Norton's and Cunningham's commentaries on the Evidence Act are in my favour.

STEPHEN AND HENDERSON JJ. Two statements have been tendered which purport to have been made by Satish Chunder Mukerjee to the last witness Shoshi Shekhar Banerjee and attested by him. They have been tendered in evidence under section 10

of the Evidence Act. It appears to us that they ought not to be admitted. Section 10 deals with [things said or done or written by one of a number of persons who have conspired together for a particular purpose mentioned (in the section), such things being done with reference to their common object, and the section provides that they are relevant as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of shewing that any such person was a party to the conspiracy.

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In the course of the hearing there have been suggestions of a conspiracy between Satish Chunder Mukerjee and other persons in connection with an alleged will of Gopal Lal Seal. And it may be that as the result of this case we may have to come to the conclusion that Satish Chunder Mukerjee and others have in fact conspired together to put forward a forged will, but as to that it would not be right that we should express any opinion now. There is, moreover, no issue before us as to whether there was a conspiracy, and even if there were, we are not prepared to say on the evidence as it stands, that there is any reasonable ground within the meaning of the section for believing that either the plaintiff Nogendra Nath Mitter or Kadambini, who has died since the institution of these proceedings, was a party to the conspiracy.

That being so, we do not consider that the statements are relevant or can be used to prove (i) the existence of the conspiracy as to which, as has been said, there is no issue, or (ii) that Nogendra Nath Mitter, the surviving plaintiff was a party to the conspiracy.

Under these circumstances the statements will be rejected.

Attorney for the plaintiff: *N. C. Bose.*

Attorneys for Kumudini Dassi: *Kali Nath Mitter & Sarbadhikari.*

Attorneys for Nayan Manjari: *S. D. Dutt & Gupta.*

R. G. M.

ORIGINAL CIVIL.

SARAT CHANDRA SINGH

v.

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July 18.

*Practice—Vakils' right to audience on the Original Side of the High Court—
Revisional Jurisdiction of the High Court over the Presidency Small Cause
Court—Civil Procedure Code (Act XIV of 1882) s. 622.*

A vakil is not entitled to audience on the Original Side of the High Court.

Applications for the exercise of the Court's revisional powers over the Presidency Small Cause Court are properly dealt with in the exercise of the Ordinary Original Civil Jurisdiction of the Court, and should be made in the usual way by an advocate of the Court instructed by an attorney.

APPLICATION by a vakil to a Judge sitting on the Original Side of the High Court.

On an application being presented on behalf of one Brojo Lal Mukerji (the defendant in the Presidency Small Cause Court suit No. 16286 of 1902), by Babu Boidya Nath Dutt—a vakil enrolled and practising on the Appellate Side of the High Court,—for the exercise of Revisional Jurisdiction under s. 622 of the Code of Civil Procedure, in respect of the decree of that Court made in the suit, the question arose as to a vakil's right to audience on the Original Side of the High Court.

The Officiating Advocate-General (Mr. L. P. Pugh) shewed cause, upon notice, against the application being made by a vakil. Vakils have no right to appear on the Original Side. This has always been the practice and never departed from. The application is one within the jurisdiction of the Original Side of the High Court, and following the practice which has been prevailing since the time when the Old Supreme Court was in existence, the vakils should not be allowed to appear and argue on the Original Side.

[The Advocate-General desired to cite authorities, but His Lordship did not think it necessary at that stage.]

Babu Boidya Nath Dutt. Under s. 6 of the Presidency Small Cause Courts Act a vakil has a right to appear in this Court which

* Application under s. 622 of the Civil Procedure Code.

has Appellate Jurisdiction over the Small Cause Court: see also s. 4, Legal Practitioners Act, and s. 15, Letters Patent and Rule 71 of Belchambers' Rules and Orders.

The Presidency Small Cause Courts Act of 1882, as amended by Act I of 1895, together with s. 15 of the Charter Act, does away with whatever Original Jurisdiction the old Supreme Court had over the Presidency Small Cause Court.

By rule 72 of the Rules and Orders of the High Court a vakil can appear in a case transferred from a District Court to the Original Side of the High Court in its Extraordinary Jurisdiction, but this right has never been asserted. Under a recent Rule* of the High Court, applications under s. 622 of the Civil Procedure Code for revising orders of the Calcutta Small Cause Court are to be made before a single Judge sitting on the Original Side of the Court. But as the revisional powers have hitherto been exercised by the Appellate Side of the Court only, the vakils are now entitled to appear before the single Judge exercising those revisional powers: *Kadambini Baiji v. Madan Mohan Basack*(1), *Jadu Mani Boistabee v. Ram Kumar Chakravarti*(2), *Haladhar Maiti v. Choytonna Maiti*(3).

The Advocate-General was not called on to reply.

SARAT J. I do not think it is necessary to call on the Advocate-General to reply, inasmuch as the question argued does not, in my opinion, admit of any real doubt.

The application is to invoke the exercise by this Court of its revisional jurisdiction over the Presidency Small Cause Court under section 622 of the Civil Procedure Code, and it is made on the Original Side of this Court to a Judge exercising the Original Civil Jurisdiction of the High Court.

The application is not made in the usual course by an advocate of this Court, but it is made by a vakil, who is admittedly not

* *Rule IVA*.—Applications under section 622 of the Code of Civil Procedure for revision of orders of the Calcutta Presidency Small Cause Court, shall be heard by a single Judge sitting on the Original Side of the High Court.

The 12th June 1903. (*Calcutta Gazette*, June 24, 1903, p. 845.)

(1) (1898) 3 C. W. N. 247.

(2) (1902) I. L. R. 29 Calc. 239.

(3) Ante, p. 588.

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entitled to practise on the Original Side of this Court. The vakil contends, however, that the revisional powers which I am asked to exercise do not fall within, or form part of, the Ordinary Original Civil Jurisdiction of this Court, and I am asked to deal with the application as a Judge exercising some jurisdiction other than the Original Civil Jurisdiction which, it is argued, has, for the purposes of applications of this character, been conferred on me by a Rule* of Court recently issued.

I am unable to assent to the proposition that the revisional powers of this Court, so far as the Presidency Small Cause Court is concerned, can only be exercised by this Court in its Appellate Jurisdiction.

It is a remarkable fact that the jurisdiction of a Judge sitting on the Original Side to exercise revisional powers over the Presidency Small Cause Court, which is now challenged for the first time, has been exercised ever since the establishment of the High Court over 40 years ago, as its records abundantly show. Within this period innumerable applications have been heard and determined by single Judges sitting on the Original Side of this Court, and orders and decrees of the Small Cause Court have from time to time been varied or set aside. No Court would, I venture to say, arrive at the conclusion that this jurisdiction had been wrongly exercised and the orders made thereunder for a long series of years were null and void, except upon the clearest grounds. I am aware that these revisional powers have in recent years been exercised on various occasions by Division Benches sitting on the Appellate Side of this Court. I say nothing with reference to the question as regards the exercise by this Court in its Appellate Jurisdiction of these revisional powers. I think, however, the fact that the High Court in its Appellate Jurisdiction has exercised these revisional powers does not necessarily affect the present question, which is whether revisional powers are, by legislative enactment or otherwise, excluded from the Original Jurisdiction of this Court. Revisional Jurisdiction of the Court is not necessarily a part of its Appellate Jurisdiction, for a Court which has no Appellate Jurisdiction over another Court may still exercise Revisional Jurisdiction over it.

* Ante, p. 987 (note).

In this way the Supreme Court exercised Revisional Jurisdiction over the Presidency Small Cause Court and, on the abolition of the Supreme Court, the High Court in its Original Jurisdiction, being vested with the powers of the Supreme Court as a Court of Original Jurisdiction, continued the exercise of the same revisional powers.

I find nothing in section 15 of the Charter Act or in section 6 of the Presidency Small Cause Courts Act which confines revisional powers to the Appellate Jurisdiction of this Court, nor are the cases which have been cited any authority for that contention.

The remaining question is whether the recent Rule* which has been issued has the effect of vesting the Judges sitting on the Original Side of the Court with some new or special jurisdiction so as to enable them to exercise powers which they would be otherwise unable to exercise. I do not think it was intended that this Rule should have any such effect or operation. So far as I know, the only object of the Rule was to set at rest the question which had arisen whether, for the future, applications for the exercise of the Court's revisional powers over the Presidency Small Cause Court should be heard on the Appellate or on the Original Side of the Court. It has now been decided that the Original Side practice to hear and determine these applications is to be continued, and that the irregularity—if I may use the expression—of sometimes making these applications on the Appellate Side of the Court should be discontinued.

In these circumstances I am of opinion that this application must be dealt with in the exercise of the Original Jurisdiction of this Court, and that the motion must be made in the usual way by an advocate of the Court, instructed by an attorney, and not by a vakil who is not entitled to audience on the Original Side of the Court.

[At the request of the vakil the petition was returned to him in order that it might be properly presented.]

J. E. G.

* Ante, p. 987 (note).

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June 2, 3, 4,
16.

Lease—Limitation—Hindu widow, lease granted by—Suit by reversioners for khas possession—Limitation Act (XV of 1877) ss. 91, 118, 125, 141.

A lease granted by a Hindu widow is on her death only voidable and not of itself void.

Modhu Sudan Singh v. Rooke(1) followed: *Sadai Naik v. Serai Naik*(2) referred to.

On the death of a Hindu widow a suit by a reversioner to recover possession of immoveable property by setting aside a lease executed by her, is governed by Art. 91 and not by Art. 141 of Sch. II. of the Limitation Act (XV of 1877).

Jagadamba Chaudhrani v. Dakkhina Mohun Roy Chaudhri(3), *Malkarjun v. Narhari*(4), *Mohesh Narain Munshi v. Taruck Nath Moitra*(5), *Shrinivas Murar v. Hanmant Chavdo Deshpande*(6), *Janki Kunwar v. Ajit Singh*(7), *Mahabir Pershad Singh v. Hurrikur Pershad Narain Singh*(8), and *Chunder Nath Bose v. Ram Nidhi Pal*(9), referred to.

Shoo Shankar Gir v. Ram Shewak Chowdhri(10), distinguished.

APPEALS (No. 71 of 1899) by the plaintiffs, Bejoy Gopal Mukerji and others, and (Nos. 74, 87, 94, 99 and 175) by some of the defendants.

These appeals arose out of an action for recovery of possession of certain immoveable property left by a deceased Hindu. The suit was brought by four out of the seven reversionary heirs.

* Appeals from Original Decrees Nos. 71, 74, 87, 94, 99 and 175 of 1899, against the decree of Prosanna Kumar Ghose, Subordinate Judge of Nadia, dated Nov. 28, 1898.

Before Sir Francis W. Maclean, K.C.I.B., Chief Justice, and Mr. Justice Geidt.

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| (1) (1897) I. L. R. 25 Calc. 1;
L. R. 24 I. A. 164. | (5) (1892) I. L. R. 20 Calc. 487;
L. R. 20 I. A. 80. |
| (2) (1901) I. L. R. 28 Calc. 532. | (6) (1899) I. L. R. 24 Bom. 260. |
| (3) (1886) I. L. R. 13 Calc. 308;
L. R. 13 I. A. 84. | (7) (1887) I. L. R. 15 Calc. 58;
L. R. 14 I. A. 148. |
| (4) (1900) I. L. R. 25 Bom. 337;
L. R. 27 I. A. 216. | (8) (1892) I. L. R. 19 Calc. 629.
(9) (1902) 6 C. W. N. 863. |
| (10) (1896) I. L. R. 24 Calc. 77. | |

The other reversionary heirs having refused to join, they were made parties, defendants. The allegation of the plaintiffs was that one Chandra Bhushan Mukerji was the proprietor of the properties, in dispute; that he died in 1832 leaving him surviving his widow, Shoyamoni Debi, as his sole heiress; that in 1270 B.S. (1863) Shoyamoni created an *ijara* of her interest for a term of 60 years (1270 to 1329 B.S.) in favour of one Saroda Prosad Mukerji, and Annoda Prosad Mukerji the father of the plaintiffs; that between 1271 to 1273 B.S. Saroda and Annoda, on the basis of their *ijara*, granted several *dar-ijaras* of those properties in favour of different persons, who again created several *se-ijaras* in favour of others; that Shoyamoni died in Kartic 1300 B.S. (September 1893), and on her death they were entitled as reversionary heirs to recover khas possession of the properties left by the last full owner.

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The suit was brought on the 30th September 1897, for recovery of possession of the said properties by cancellation of the *ijara* created by Shoyamoni and of the *dar-ijaras* and *se-ijaras* created by the *ijaradars*. The defence, *inter alia*, was that the Court had no jurisdiction to entertain the suit; that the suit was bad for non-joinder and misjoinder of parties; that the suit was barred by the general and special law of limitation; that the plaintiffs were not entitled to maintain the suit in respect of their shares only; that the *ijara*, *dar-ijaras* and *se-ijaras* were valid and binding as against the plaintiffs, as they were created for legal necessity and with the consent of the then reversioners; and that by acceptance of rent and allowing the *ijaradars* to go on paying the Government revenue, the plaintiffs must be taken to have elected in favour of the lease.

The Court of First Instance having overruled the objections set aside the *ijara*, the *dar-ijaras* and *se-ijaras*, and decreed the plaintiffs' claim for khas possession of the properties with the exception of those in dispute lying in the districts of Faridpore and Mymensingh.

Dr. Ashutosh Mookerjee (Babu Hara Prosad Chatterjee and Babu Chunder Kant Ghose with him) for the defendants-appellant (in appeal No. 74). The only question (material to the point) is whether the suit of the plaintiffs is barred by limitation. I submit

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that Article 91 of Schedule II of the Limitation Act applies to this case. The reversioners are bound to set aside the lease before they can recover possession from my clients, who are the *ijaradars*, *dar-ijaradars*, etc. The plaintiffs themselves took that view of the matter as appears from their prayer (*Ka*) in the plaint. The lease by the widow became, on her death, only voidable and not void. The following cases were cited:—*Modhu Sudan Singh v. Rooke*(1), *Sadai Naik v. Serai Naik*(2), *Jagadamba Chaudhrani v. Dakhina Mohun Roy Chaudhri*(3), *Malkarjun v. Narhari*(4), *Mohesh Narain Munshi v. Taruck Nath Moitra*(5), *Shrinivas Murar v. Hanmant Chavdo Deshpande*(6), *Janki Kunwar v. Ajit Singh*(7), *Mahabir Prashad Singh v. Hurrihur Pershad Narain Singh* (8), *Chunder Nath Bose v. Ram Nidhi Pal*(9), *Jagannath Prasad Gupta v. Runjit Singh*(10), *Ram Chandra Mukerjee v. Ranjit Singh*(11), *Lali v. Murtidhar*(12).

Dr. Rash Behary Ghose (*Babu Ram Charan Mitter* and *Babu Lal Mohan Das* with him) for the respondents. I contend that Article 91, Schedule II of the Limitation Act has no application to the present case, which is governed by twelve years' limitation prescribed by Article 141 of the 2nd Schedule of the Act. The main object of the suit is to recover possession of immoveable properties, and the plaintiffs' prayer to set aside the *ijara*, *dar-ijaras* and *se-ijaras* is subservient to that prayer. The plaintiffs are not bound to have the *ijara*, *dar-ijaras*, *se-ijaras* etc., set aside: see Articles 121 and 125, Schedule II of the Act. I rely on the following cases:—*Sheo Shankar Gir v. Ram Shewak Chowdhri*(13), *Sham Lal Mitra v. Amarendra Nath Bose*(14), *Sreeramulu v. Kristamma*(15), *Beni Pershad Koeri v. Dudh Nath Roy*(16), *Srinath Kur v. Prosunno Kumar Ghose*(17), *Pursut Koer v. Palut*

- (1) (1897) I. L. R. 25 Calc. 1;
L. R. 24 I. A. 164.
- (2) (1901) I. L. R. 28 Calc. 532.
- (3) (1886) I. L. R. 13 Calc. 308;
L. R. 13 I. A. 84.
- (4) (1900) I. L. R. 25 Bom. 337;
L. R. 27 I. A. 216.
- (5) (1892) I. L. R. 20 Calc. 487.
- (6) (1899) I. L. R. 24 Bom. 280.
- (7) (1887) I. L. R. 15 Calc. 58;
L. R. 14 I. A. 148.

- (8) (1892) I. L. R. 19 Calc. 629.
- (9) (1902) 6 C. W. N. 863.
- (10) (1897) I. L. R. 25 Calc. 354.
- (11) (1899) I. L. R. 27 Calc. 242.
- (12) (1901) I. L. R. 24 All. 195.
- (13) (1896) I. L. R. 24 Calc. 77.
- (14) (1895) I. L. R. 23 Calc. 480.
- (15) (1902) I. L. R. 26 Mad. 143.
- (16) (1899) I. L. R. 27 Calc. 156;
L. R. 26 I. A. 216.
- (17) (1883) I. L. R. 9 Calc. 984.

Roy(1), *Sheo Narain Singh v. Khurgo Koerry*(2), and *Runchordas Vandrachandras v. Parvatibai*(3).

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Dr. Ashutosh Mookerjee in reply.

Cur. adv. vult.

June 16.

MACLEAH C.J. This is a suit by four out of the seven reversionary heirs of a deceased Hindu, subject to the interest of his widow, and its object is to have a certain *ijara* lease for sixty years, dated September 1863, and all the *dar-ijaras* and *se-ijaras* and other rights subordinate thereto declared inoperative as against the plaintiffs for khas possession of the property in dispute and for mesne profits.

The suit was substantially decreed by the Subordinate Judge of Nadia; and against that decision six appeals have been presented, one of them, No. 71 of 1899 by the plaintiffs, on the ground that the Court below had not given them all to which they are entitled, whereas appeals Nos. 74, 87, 94 and 99 are by those claiming under the *ijara*, whilst appeal No. 175 relates to a very small matter; and the plaintiffs and the appellant in that appeal have settled it.

The following is a short history of the case:—

One Chunder Bhusan Mukherjee, from whom the title of the plaintiff is traced, died in 1832, without any son, but leaving his wife, Shoyamoni, him surviving. At that time she was a child, apparently about ten or eleven years old; she survived her husband for more than 60 years, and died in October 1893. She would appear to have been dispossessed of the property to which she was entitled as heiress of her husband by a relation of his, one Baman Das Mukherjee, and in 1844 she instituted a suit to recover the property inherited from her husband: the litigation lasted from 1844 to 1858, when her right, which had been decreed by the first Court and by the Sudder Dewany Adalut, was ultimately affirmed by the Judicial Committee of the Privy Council in 1858. She would appear to have experienced great difficulty in reaping the advantage of her decree owing to the opposition of Baman Das: she obtained possession

(1) (1881) I. L. R. 8 Calc. 442.

(2) (1882) 10 C. L. R. 337.

(3) (1899) I. L. R. 23 Bom. 725.

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of part of the property only, and in September 1863 she executed the *ijara* lease now complained of. The *ijaradars* under the *ijara* were Annoda Prosad Mukerjee and Saroda Prosad Mukerjee, the former of whom was, at that time, one of the reversioners, whilst Saroda Prosad Mukerjee was the son of another reversioner Gouri Prosad Mukerjee. Annoda Prosad Mukerjee, who died in 1882, was the father of the present plaintiffs and of Upendra Lall Mukerjee, who is also one of the reversionary heirs, and who declining to be a plaintiff was made a defendant in the suit. The other reversionary heirs are Tara Nath Mukerjee and Nil Ratan Mukerji, and they are defendants. The rental reserved under the *ijara* was Rs. 12,330 odd; the term was for sixty years from the date of the lease, and the *ijaradars* were to pay out of the above rent Rs. 7,030 odd, the collectorate sudder revenue.

It is objected for the plaintiffs that Shoyamoni had no power to grant a lease of the property beyond the period of her own life.

The defendants are those claiming under the *ijaras dar-ijaras* and *se-ijaras*.

The plaintiffs claim that the *ijara* lease for the period beyond the life of the widow is an incumbrance on the estate, that they are entitled to have it set aside, and, as I have already pointed out, they ask for that relief with a view to obtain khas possession of the property.

I have already mentioned that the widow died in October 1893, and the suit was instituted on the 30th of April 1897, more than three years after her death.

The defendants contend (i) that the suit is barred by limitation; (ii) that the lease is binding upon the plaintiffs, as it was executed for legal necessity and with the consent of the then reversioners; and (iii) that by acceptance of rent and allowing the *ijaradars* to go on paying the Government revenue, the plaintiffs must be taken to have elected in favour of the lease.

The defendants are in possession, and if they are right on the first point, the others become immaterial.

The case of the defendants is that the plaintiffs cannot recover possession of the property without first setting aside the *ijara* lease of 1863; that that lease is an obstacle in their path which

they must get rid of; that the form of their suit recognizes that this is so; and they contend that, under those circumstances, the case falls within Article 91 of the Second Schedule to the Limitation Act, which runs as follows:—"To cancel or set aside an instrument not otherwise provided for," the period of limitation being "three years from the time when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him."

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The plaintiffs, on the other hand, say that the suit is one merely for the recovery of possession of immoveable property to which they become entitled on the death of the widow, and they rely upon Article 141 of the Schedule, which runs as follows:—"Like suit," that is, a suit for possession of immoveable property "by a Hindu or Mahomedan entitled to the possession of immoveable property on the death of a Hindu or Mahomedan female," the period of limitation is "twelve years" from the time "when the female dies."

These being the contentions of either side, we have first to consider whether the lease in question was *void* or *voidable*. This is set at rest by the Judicial Committee of the Privy Council in the case of *Modhu Sudan Singh v. Rooke*(1), where it was held that a lease similar in principle to that now under discussion was, on the death of the widow, only voidable and not of itself void. Their Lordships there say at page 8:—

"In considering their effect it must be observed that the *putni* was not void; it was only voidable; the Raja might elect to assent to it, and that it was valid. Its validity depended upon the circumstances in which it was made. The learned Judges of the High Court appear to have fallen into the error of treating the *putni* as if it absolutely came to an end at the death of the widow."

This case(1) has been followed by this Court in the case of *Sadai Naik v. Serai Naik*(2).

In the present case it may be remembered that the defence of legal necessity and of election to treat the lease as valid, if substantiated, would show that the lease could not be treated as *ipso*

(1) (1897) I. L. R. 25 Calc. 1; L. R. 24 I. A. 164.

(2) (1901) I. L. R. 28 Calc. 532.

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facto void. The plaintiffs evidently treat the lease as one that must be avoided by being set aside; and the question before us appears to resolve itself into this—whether they could obtain *khas* possession without having the lease set aside. If they could not, Article 91, and not Article 141, would seem to govern the case.

There appears to us to be no real difference in principle between the present case and those cases in which the Judicial Committee has held that when a plaintiff seeks to recover *khas* possession of property, and he cannot successfully do so unless and until he displaces an apparent adoption, which stands in his way, his suit must be regarded as one to obtain a declaration that the adoption is invalid, and he must bring it within the period specified in Article 118 of the Second Schedule to the Limitation Act. I refer to the case of *Jagadamba Chaudhrani v. Dakhina Mohun Roy Chaudhri*(1) and to the observations of their Lordships in the case of *Malkarjun v. Narhari*(2). In the latter case their Lordships say at page 350:—"Then the suit, being rightly described as one to set aside an adoption, attracted the consequence that the time for suing ran from the date of the adoption, and that the suits of 1873 and 1874 were barred. It is obvious that the expression 'set aside a sale' is not attended by any such difficulty, because a sale, valid until set aside, can be legally and literally set aside; and anybody who desires relief inconsistent with it may and should pray to set it aside." The same view was held by the Privy Council in the case of *Mohesh Narain Munshi v. Taruck Nath Moitra*(3) and followed by the Full Bench of the Bombay High Court in the case of *Shrinivas Murar v. Hanmant Chavdo Deshapand* (4).

Again, the same principle would appear to be involved in the cases of *Janki Kunwar v. Ajit Singh*(5), *Mohabir Pershad Singh v. Hurrihur Pershad Narain Singh*(6), *Chunder Nath Bose v. Ramnidhi Pal*(7) and *Shrinivas Murar v. Hanmant Chavdo Deshapande*(8). The only case in this Court which would appear to take a contrary view is that of *Sheo Shankar Gir v. Ram*

(1) (1886) I. L. R. 13 Calc. 308;

L. R. 13 I. A. 84.

(2) (1900) I. L. R. 25 Bom. 337;

L. R. 27 I. A. 216.

(3) (1892) I. L. R. 20 Calc. 487;

L. R. 20 I. A. 30.

(4) (1899) I. L. R. 24 Bom. 260.

(5) (1887) I. L. R. 15 Calc. 58;

L. R. 14 I. A. 148.

(6) (1892) I. L. R. 19 Calc. 623.

(7) (1902) 6 C. W. N. 863.

(8) (1899) I. L. R. 24 Bom. 260.

Shewak Choudhri(1), but there the document was treated as void and not voidable.

It seems to me to be a little foreign to the present enquiry to discuss the cases of *Jagannath Prasad Gupta v. Runjit Singh*(2), *Ram Chandra Mukerjee v. Ranjit Singh*(3), and of *Lali v. Moorlidhar*(4), for these were cases the converse of that in the Privy Council—*Jagadamba Chaudhrani v. Dakhina Mohun Roy Chaudhri*(5), and that of *Shrinivas Murar v. Hanmant Chavdo Deshapande*(6).

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In the case before us the plaintiffs expressly ask to have the *ijara* lease set aside, and cannot recover possession unless it is set aside.

From these authorities it would appear that if the plaintiffs can recover possession without setting aside the lease, then Article 141 would apply, and not Article 91 ; but if they cannot so succeed without getting rid of the lease, then the case would fall within Article 91.

It is contended, however, for the plaintiffs that Article 91 cannot apply, because the time from which the period begins to run is when the facts entitling the plaintiffs to have the instrument cancelled or set aside become known to them.

It has not been disputed that these facts were known to them on the death of the widow, and probably long before, for the father (Annoda) of five of the reversioners was himself one of the *ijaradars*, and his *ijara* interest passed under his will. But it is said that these facts might have become known to them during the life of the widow, in which case they would have had to bring their suit during her lifetime. If well founded, I scarcely see how this argument would assist the plaintiffs: it would only mean that they were not necessarily entitled to three years from the death of the widow ; but the argument does not appear to me to be sound, because the lease was perfectly good during the widow's life, and the reversioners did not become entitled to have the instrument set aside until after her death, and her death is one of the elements which entitled them to have it set aside.

(1) (1896) I. L. R. 24 Calc. 77.

(2) (1897) I. L. R. 25 Calc. 354.

(3) (1899) I. L. R. 27 Calc. 242.

(4) (1901) I. L. R. 24 All. 195.

(5) (1896) I. L. R. 13 Calc. 308.

(6) (1899) I. L. R. 24 Bom. 260.

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In the case suggested the plaintiffs might have proceeded under Article 125 which does not appear to clash, as has been suggested, with the view we take as to the applicability of Article 91. If a reversioner desire to set aside a deed executed by a Hindu widow, which is voidable as against him, the Legislature may well have thought that it was desirable that such suits should be brought within a much shorter period than that prescribed for the recovery of immoveable property in ordinary cases.

On these grounds I think the suit was barred by limitation, and it must be dismissed with costs.

The result will be that appeals Nos. 74, 87, 94 and 99 will be allowed with costs, and appeal No. 71 will be dismissed with costs. Appeal No. 175 was compromised.

As between the plaintiffs and the defendants Nos. 18 to 24, both inclusive, we on the first day of the hearing, *i.e.*, at the hearing of appeal No. 71, sanctioned a compromise which the parties had come to. That was before the case had been argued. That compromise will stand and will not be affected by the judgment which has just been delivered as between the plaintiffs and the other defendants

**GRIFF J.** I concur.

**S. C. G.**



## ORIGINAL CIVIL.

KUSUM KUMARI ROY

v.

SATYA RANJAN DAS.\*

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*Hindu Law—Adoption, validity of—Son of a Brahmo, adoption of—Onus of proof  
—Incapacity—Brahmo Samaj—Evidence taken on Commission, reference to  
—Practice.*

The fact of adoption being admitted and its validity impugned on the ground of incapacity on the part of the adopted son, it is for the party so impugning the validity of the adoption to establish the alleged incapacity.

No question as to custom or usage being raised in the pleadings, the adoption must be determined by reference to the principles of Hindu law.

Evidence taken on commission until tendered and admitted as evidence in the suit, cannot be made use of by either party.

*Nistarini Dasse v. Nundo Lall Bose*(1) dissented from.

Inasmuch as a Hindu having renounced Hinduism is entitled to revert to Hinduism according to the rites of that religion, it follows that his infant son can with his consent and approval also revert in the same manner.

Where an orthodox Hindu adopted an infant son of a member of the Sadharan Brahmo Samaj :—

*Held*, that in the absence of proof of special custom such adoption was valid under the Hindu law.

*Shamsing v. Santabai*(2) followed.

TRIAL of a preliminary issue raised in original suit.

The suit was originally brought for the construction of the will of one Kali Mohan Das, an orthodox Hindu, for a declaration of the right of the parties, for administration, for the appointment of fresh trustees, for a Receiver and other reliefs.

On the case coming on for hearing it appeared that the claim for administration mainly depended on the question of an alleged adoption, and it was held that if a declaration was sought with regard to the validity or otherwise of such adoption the plaint must contain a prayer for the same, and it was directed that on the plaint being amended the question as to the

\* Original Civil Suit No. 759 of 1897.

(1) (1899) 3 C. W. N. (notes) 239. (2) (1901) I. L. R. 25 Bom. 351.

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adoption should be tried as a preliminary issue between the plaintiff and the adopted son.

On this issue coming on for hearing it appeared that Kali Mohan Das died on the 16th of February 1887 leaving a will bearing date the 8th of August 1884. That his widow Chandramoni Debi had, some time in May or June 1890 in execution of a power given her by such will, purported to take in adoption the defendant Basanta Kumar Das, a natural son of one Bhuban Mohan Das who was, at the date of the alleged adoption as also at the date of the birth of the said Basanta Kumar Das, a member of the Sadharan Brahmo Samaj and had not since renounced such membership.

The question, therefore, for determination was whether such adoption by an orthodox Hindu under the above circumstances could be considered a valid and binding adoption and a good exercise of the power in that behalf contained in the said will.

*Mr. Avetoom (Messrs. N. Chatterji, J. Chatterji, J. N. Roy, R. C. Sen, S. Ashgar, J. Banerjee and A. N. Choudhuri with him)* for the plaintiff. The plaintiff is the grand-daughter, and in the event of the adoption being valid she would not be entitled to administration. The adoption is put forward by the other side to defeat the plaintiff's right to administration.

Bhuban Mohan Das joined the Brahmo Samaj, and his son born after that date is also a Brahmo and a non-Hindu. No Hindu can take a child in adoption who is not a Hindu, therefore the adoption of this Brahmo boy is not a valid adoption, without his first having gone through the ceremony of purification. The onus of proving this and that the adoption is a valid one is on the other side: see *Bhoobunessuree Debia v. Gourree Doss Turkopunchanun*(1). The party pleading an adoption must prove it: *Chowdry Pudum Singh v. Koer Oudey Singh*(2), *Ta'in Charan Chowdhry v. Suroda Sundari Dasi*(3). *Kali Kishore Dutt Gupta Mosumdar v. Bhusan Chunder*(4); Ameer Ali and Woodroffe's Evidence Act, 2nd Edn, p. 213. And I propose to refer to

(1) (1869) 11 W. R. 535.

(3) (1869) 3 B. L. R. (A.C.) 145, 195.

(2) (1869) 12 Moo. I. A. 350.

(4) (1890) 1 L. R. 18 Calc. 201; L. R. 17 I. A. 159.

evidence of one of the witnesses on the other side, taken on commission in the administration suit: *Nistarini Dassees v. Nundo Lall Bose*(1).

*Mr. Dunne* (*Messrs Sinha, Chakravarti, B. C. Mitter* and *S. M. Bose* with him) for the defendant *Basanta Kumar Das*, the adopted son. They have had ample opportunity of raising this question of adoption before. In questions of adoption the following points arise (a) whether authority was given to adopt—which is admitted here—and in the cases cited by my learned friend the authority was denied; (b) the fact of adoption—this too is admitted. By the order directing the trial of this issue they were given the opportunity of asking relief on the footing of the invalidity of the adoption: see *Kusum Kumari Ray v. Satya Ranjan Das*(2). The only question is as to the validity of the adoption.

The *onus* is not on me. In *Bhoobunessuree Debia v. Gourree Doss Turkopurchanun*(3), the authority given in a will to adopt was in question—that case is quite different to the present. In *Chowdry Pulum Singh v. Koor Ooday Singh*(4), the Privy Council simply went into the question of authority.

The decision of *Stanley J.* in *Nistarini Dassees v. Nundo Lall Bos*:(1), in allowing reference to be made at the opening of a case to evidence taken on commission as part of the record under s. 389 of the Code of Civil Procedure, is contrary to the practice, and has often been disregarded.

[*SALE J.* As regards the preliminary issue of adoption it seems to me that the position has not altered since the case was last before the Court.

June 12.

On the settlement of issues when the preliminary issue of adoption was raised and was set down for determination, I took the opportunity of pointing out that upon the pleadings as they then stood the plaintiff would not be entitled to all the relief she sought unless and until the adoption referred to in her plaint had been declared invalid, and I also expressed the opinion that

(1) (1899) 3 C. W. N. (notes) 239.

(3) (1869) 11 W. R. 535.

(2) (1900) 5 C. W. N. 162, 167.

(4) (1869) 12 Moo. I. A. 350.

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unless the plaint was so altered and amended as to admit a declaration of that kind being made in the suit that it would be the duty of the Court to regard the adoption not only as admitted in fact but valid in law.

It was pointed out to me by the learned counsel who then appeared for the plaintiff that there had been some sort of misconception of the plaintiff's position and that it was not intended on the part of the plaintiff to admit either the *factum* or validity of the adoption, and I remember a strong appeal was made to me to allow the plaintiff another opportunity of disputing the *factum* and validity of the adoption, and for the reasons given in my judgment I gave the plaintiff another opportunity to raise issues of fact and law bearing on the question of adoption and for the purpose to make such specific allegations of fact as she was desirous of proving.

It is quite clear from what has happened and from the amendments that now appear in the plaint that there is no real dispute between the parties at all on the facts. There are no allegations in the amended plaint tending to disprove the fact of adoption—no denial of the alleged recognition of the adoption by the members of the family, nor is there any allegation as regards the omission of necessary ceremonies in respect of the adoption.

The plaintiff has therefore failed to take advantage of the opportunity afforded her of making a definite case in the issue of adoption.

I must, therefore, now assume that there is no dispute between the parties as to the fact of adoption. The only ground upon which the validity of adoption is challenged is the alleged incapacity on the part of the boy who was taken in adoption. It is said he is the son of a member of the Sadharan Brahmo Somaj and as such he is incapable of being received in adoption in a Hindu family. It is for the plaintiff to establish the incapacity. It is a question of law, not a question of fact. The question must be determined by reference to the principles of Hindu Law,—no question as to custom or usage being raised in the pleadings.

On the pleadings therefore the *onus* of establishing the invalidity of the adoption lies on the plaintiff.

One other question has been suggested, namely, as to the right of the plaintiff to take advantage of the evidence which has been taken on a commission issued at the instance of the defendant which evidence has been returned with the commission but has not been admitted as evidence in the suit—and which the plaintiff does not propose to tender as her evidence. The practice for a long time has been that until evidence taken on commission is tendered and has been admitted as evidence in the suit, neither party has the right to make use of it. My attention has been directed to a case (1) in which a contrary opinion appears to have been expressed. It is a question of practice, and I think the practice is well founded in principle, and I must take leave to repeat what I have often said before, that in the case of a long established practice, it is undesirable and inconvenient that a single Judge sitting on the Original Side should set it aside without any consultation with his colleagues.

It is above all things desirable that the practice on the Original Side of this Court should be uniform, and to secure this end it has been the rule with Judges sitting on the Original Side not to set aside any settled practice of that Court without the concurrence of the other Judges exercising Original Jurisdiction.

The decision referred to, though deserving of the utmost respect, is contrary to the practice of this Court which has long prevailed and I must respectfully decline to follow it.

In my opinion the plaintiff is not entitled to refer to the evidence taken on commission unless and until that evidence has been tendered and has been admitted as evidence in the suit.]

*Mr. Aveloom* (continued). The Brahma Samaj is defined in the Century Dictionary as a worshipping assembly with a monotheistic religion. Its preaching has been accompanied by works of practical reformation such as the abolition of polygamy, of caste and of idolatry in all its forms, the reformation of marriage customs, and a temperance reform: see also Wilkins on Hinduism, p. 108.

Bhuban Mohan Das married his daughters under the Civil Marriage Act which is essentially one for non-Hindus. It

(1) (1899) 3 C. W. N. (notes) 239.

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provides for divorce which is quite unknown to Hindu Law ; and he belonged to a Society one of whose tenets was not to give their sons in adoption : see Banerjee's Hindu Law of Marriage and Stridhana, p. 99.

Brahmos are not Hindus in the true sense of the term. Bhuban never returned to Hinduism, and his son was not born a Hindu : *In the matter of Joshy Assam*(1). This child never was a Hindu and his adoption into a Hindu family could not be allowed : see *Mokoond Lal Singh v. Nobodip Chunder Singha*(2) where a Christian father was not considered a fit and proper person to be appointed guardian of his Hindu minor son. Reference was also made to P. C. Mazumdar's life of Keshab Ch. Sen, p. 153 ; First Annual Report of the Sadharan Brahma Samaj ; Speech of Keshab Chandra Sen of 30th September, 1881 ; Census Report of India for 1901 containing a reference to Brahmos who do not recognise castes ; Gazette of India, 27th January 1872, pp. 66, 67 and Monnier Williams on Hinduism p. 151.

The boy was a Brahmo and could never have come back to Hinduism. But assuming he was a Hindu, even then was his adoption valid ? We are Vaidyas and not Sudras.

[SALE J. This is merely a question of law as to whether the child had the capacity of being adopted. You did not raise the issue of the fact of adoption in the plaint, and you are not entitled to raise it now.]

*Mr. Dunne* A Hindu is no less a Hindu because he has modified his views of Hinduism. If a Hindu does change his religion he can return to it—that shews that all along he was a Hindu. If by changing his religion he ceases to be a Hindu, what does he become ? His *status* does not change and he is still governed by the Hindu law.

The Jains are Hindus but they don't profess the Hindu religion. So also are Sikhs governed by the Hindu law. The Hindu law of inheritance must apply to them, and the whole question is one of *status*. As for the law that governs these people, see *Shamsing v. Santabai*(3).

(1) (1895) I. L. R. 23 Calc. 290. (2) (1898) I. L. R. 25 Calc. 881.

(3) (1901) I. L. R. 25 Bom. 551.

*Mr. Chakravarti* (following *Mr. Dunne*). Ordinary Hindu law applies to this case in the absence of proof of special custom : see *Chotay Lall v. Chunn Lall*(1).

There is no case or text for the proposition that a Hindu on rejecting a portion of the tenets of Hindu religion ceases to be a Hindu.

On a Hindu accepting Brahmoism he rejects the doctrine of caste, and prefers to worship one universal God instead of a number of deities. The practical difference is that Brahmoism does not accept the efficacy of ritual worship. As to adoption : in Hindu law as also in Roman law the father had complete control over his children as well as over his wife. The power of giving in adoption is ancillary to the right of guardianship and is a remnant of the old absolute control. The right to give in adoption is a right of disposition—a portion of the *patria potestas* : see *Panchapna v. Sangambasawa*(2), and compare the question of guardianship: *Muchoo v. Arsoon Sahoo*(3), *Abraham v. Abraham*(4).

The most recent decision of the Privy Council shews that adoption has lost its religious character almost entirely and rests on the secular basis of a desire to continue the family line : see *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma*(5). When a son is adopted from a different class the adoption is not void, but the claim of the adopted son is reduced to one for maintenance only : see *Manik Chand Golecha v. Jagat Settani Pran Kumari Bibi*(6).

Subject to certain conditions Bhuban Mohan Das could return to the old communion and if he did so, performing the expiation ceremony, his children would return with him as of course : see Wilford's *Modern Hinduism*, p. 364 ; Jogendra Nath Bhat-tacharjee's *Hindu Castes and Sects*, p. 446, 487, 496 ; Monnier Williams on *Hinduism*, p. 524 ; Golap Chandra Sarkar's *Hindu Law of Adoption*, pp. 140, 358.

A Brahmo is only a dissenter and so is not precluded from having the Hindu law applied to him. He would not be governed

(1) (1878) I. L. R. 4 Calc. 744 ;

L. R. 6 I. A. 15, 20.

(2) (1899) I. L. R. 24 Bom. 89, 94.

(3) (1866) 5 W. R. 235.

(4) (1868) 9 Moo. I. A. 195, 205,

211, 224.

(5) (1899) I. L. R. 21 All. 460.

(6) (1889) I. L. R. 17 Calc. 518.

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by the Succession Act: see *Anund Oommar Gangolly v. Rakhal Chunder Roy*(1).

*Mr. Avetoom* in reply.

**SALJE J.** The only question that arises now is on the preliminary issue, namely, whether the added defendant Basanta Kumar Das, a son of Bhuban Mohan Das, was in accordance with the authority in that behalf contained in the will validly adopted as a son to the testator Kali Mohan Das.

When this suit was instituted there was no issue raised as to the adoption of the present infant defendant, the adopted son not being even a party to the suit. On the application for the appointment of a Receiver it was pointed out that there was an obstacle in the way of the plaintiff, namely, the existence of an adopted son of the testator and there upon leave was given to the plaintiff to bring the adopted son on the record and to take steps to question the adoption if the plaintiff so desired, and leave to amend the plaint was given to the plaintiff. As a result of the leave given, paragraph 13A was added to the plaint and so far as the question of adoption is concerned it runs as follows:—

“ That the plaintiff is informed that in or about the month of Joisto in the Bengali year 1297 corresponding with parts of the months of May and June 1890, the said Chandramoni Debi purported to take in adoption the defendant Basanta Kumar Das, a natural son of the defendant Bhuban Mohan Das, but the plaintiff is advised and believes and submits that inasmuch as the said Bhuban Mohan Das was at the date of the said alleged adoption and also at the date of the birth of the said defendant Basanta Kumar Das and is now, a member of the Sadharan Brahmo Somaj, and inasmuch as he had, many years prior to the dates above mentioned renounced the Hindu religion the said alleged adoption of the said Basanta Kumar Das by the said Sreemutty Chandramoni Debi was absolutely invalid under the Hindu Law and did not operate to pass any title whatever to the said defendant Basanta Kumar Das under the provisions of the said will in and to the estate of the said testator.”

(1) (1867) 8. W. R. 278.



The case then came on for settlement of issues and my former judgment deals fully with the arguments on the questions which were then discussed; I was of opinion that on the pleadings as then framed the fact of the adoption and its recognition by the members of the family was substantially admitted, and the only issue raised was one of law, namely, whether the father of the adopted son having at the date of the adoption renounced Hinduism, could validly give his son in adoption according to the rites of the Hindu religion.

An appeal was made to me, however, to give the plaintiff another opportunity of questioning the fact of the adoption, and I was informed that the plaintiff was anxious to raise issues bearing on the fact of the adoption. In order that the whole question might be dealt with and disposed of finally, and the question of adoption set at rest, I gave the plaintiff leave to amend her plaint with the object that definite allegations of fact bearing on the adoption should be made, and the grounds on which the adoption was challenged should be expressly stated. This was, I am quite sure, fully understood when the leave to amend the plaint on this point was given.

The plaint has now been re-amended and I asked to raise a variety of issues both as regards the caste of the family, whether certain ceremonies were performed which are essential to the twice-born castes to which it is said the family of the testator belonged; and whether the renunciation by the father of the adopted son of certain Hindu beliefs and doctrines, constituted him a non-Hindu and incapacitated him from giving his son in adoption to an orthodox Hindu family.

The question of fact as to the ceremonies which were or were not performed at the adoption, and as to the caste of the family whether it belongs to the Sudra caste or to one of the twice-born castes—as the plaintiff now for the first time asserts—are in my opinion questions which do not arise in the amended pleadings, and it would I think be a pure waste of time to permit them to be raised now. In substance the plaint retains its form as originally amended. The only change made under the leave granted on the last occasion is the interpolation of the following passage into paragraph 13 A of the amended plaint. That

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paragraph after stating that the widow of the testator in the year 1890 purported to take in adoption the defendant Basanta Kumar Das proceeds:—

“That the defendant Basanta Kumar Das was not in fact adopted as a son to the said testator.”—Beyond this bare denial of the fact of the adoption, which must be taken in conjunction with the allegation made in the same paragraph, that the widow of the testator thirteen years ago purported to take in adoption the defendant Basanta Kumar Das,—and which adoption so far as allegations in the pleadings are concerned must be taken to have been recognized by the family as a valid adoption, ever since the adoption took place—there is not a single allegation of fact of any kind which discloses the ground on which the fact of the adoption is challenged.

Under these circumstances I decline to consider any question other than the question of law which was originally raised. I decline to enquire whether the family of the testator belongs to the Sudra caste—according to the generally accepted notion or whether it belongs to the twice-born castes—as the plaintiff now asserts through her counsel. I also decline to enquire what were the necessary formalities to be observed at the adoption and whether such were in fact observed. Nor do I propose, as I have also been invited to do, to enter into an abstract discussion as to the religious tenets of the Brahmos in general, of the Sadharan Brahmo Samaj in particular—nor to attempt to assign to the professors of Brahmoism their exact position in the system of religions. All these questions I consider are outside the pleadings in this suit and are as unnecessary to discuss and as irrelevant as would be a question of the domicile of the adopted son, supposing the plaintiff had desired to raise that question now. I come therefore to the question of the validity of the adoption of the defendant Basanta Kumar Das.

How is the validity challenged? It is said that Babu Bhuban Mohan Das, the natural father of the adopted son, has ceased to be a Hindu and was not a Hindu at the date of the adoption and that he was therefore incapacitated from his giving his son in adoption according to Hindu rites. Assuming however that Babu Bhuban Mohan Das has abandoned certain of the more important

Hindu tenets and practices, and that in this sense he is a non-Hindu, it is admitted that he is by birth and descent a Hindu, and that he could, if so desired at any moment, revert to Hinduism by undergoing the necessary expiatory ceremonies.

If the natural father could himself revert to Hinduism, it is difficult to understand, why an infant son of his should not be received into Hinduism according to the rites of that religion if his natural father, who is his legal guardian, in the exercise of his discretion consents to and approves of that step. No Court of law would, I apprehend, interfere with the exercise by a natural father and guardian of his own discretion in a case of the kind. In a recent Bombay case, *Shamsing v. Santabai* (1), it was held that a Hindu father does not lose his capacity to give his son in adoption by reason of his conversion to Mahomedanism, and it was pointed out that this right was incidental to the civil guardianship of his son, which the lapse from Hinduism did not affect. In that case, as in the present, the authority to give in adoption was delegated by the non-Hindu father to an orthodox member of the family.

It is said that the case is distinguishable, inasmuch as the son of the father who became Mahomedan remained a Hindu. In the present case it is asserted that the adopted son was not a Hindu at the date of the adoption and that he was not even born a Hindu. But the material fact is that the adopted son is by origin and descent a Hindu, and a member of the family which was originally Hindu and which as regards certain of its branches still remains Hindu. I have not been referred to any authority which decides that a son of a father who was a Hindu but had abandoned the tenets and practices of Hinduism, could under no circumstances revert to Hinduism, if he was born after the father had ceased to conform to Hinduism. If the father can revert to Hinduism, surely so can the son. It must, I apprehend, be admitted that the defendant Basanta Kumar Das, if he had remained a Brahmo, could on attaining years of discretion revert to Hinduism which was the religion of his father and if he could take that step on attaining the proper stage, what was there to prevent his father from taking the same action on behalf of his

(1) (1901) I. L. R. 25 Bom. 551.

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infant son, if the father in the exercise of his discretion and believing he was acting in the best interests of his son thought proper so to do. Such an act cannot be adjudicated by a Court of law as illegal or wrong without an enquiry as to the respective merits of Hinduism and Brahmoism as systems of faith and morals, and any such inquiry would be outside the Court's jurisdiction.

Although the adoption in question has in the course of the argument been confidently challenged as illegal and invalid, it is a singular fact that until the present litigation arose the adoption was, as I must assume on the pleadings, never questioned, and the adopted son has been throughout recognized and treated as a member of an orthodox Hindu family.

The conclusion I arrive at is that the plaintiff has failed to impugn the validity of the adoption of the defendant Basanta Kumar Das, and I must declare that the defendant Basanta Kumar Das is the validly adopted son of the testator.

The plaintiff must pay the costs of the hearing of this issue.

[The further hearing of the case, for the determination of the remaining issues, if any, was adjourned.]

Attorney for the plaintiff: *H. N. Dutt.*

Attorneys for the defendants: *Ghose & Kar, N. C. Dutt, B. N. Bose and S. C. Ghose.*

J. E. G.

## APPELLATE CIVIL.

NAGENDRABALA DASSI

v.

GURU DOYAL MUKERJI.\*

1903

May 1.

*Principal and Agent—Illegal cess—Khurcha—Liability of Agent to account for sums realized, not legally recoverable by Principal.*

An agent is liable to account to his principal for the sums realized by him from tenants although the said sums are not legally recoverable by the landlord as being illegal cesses.

*Nobin Chunder Roy Chowdhry v. Gooroo Gobind Mojoomdar* (1) doubted. *Gobind Soonder Singh v. Chandi Charan Bhattacharjee* (2) followed.

SECOND APPEAL by the plaintiff, Nagendrabala Dassi.

This appeal arose out of an action for accounts. On the 9th August 1897, a preliminary decree was passed for accounts against the defendant who was the *gomasta* (agent) of the plaintiff. The defendant on the 30th September 1897 submitted an account to the Court. The plaintiff questioned the correctness of the account submitted by the defendant, and the matter was referred to a commissioner for enquiry. Babu Ishwar Chandra Das, a pleader practising on the Munsif's Court at Phulbari, was appointed commissioner. The commissioner went to the mehal and prepared a list of the sums collected by the defendant. The list showed realization of rents, cesses, interest, and of another item called *khurcha*.

The Court of First Instance having held that *khurcha* being an *abwab* or illegal exaction such exactions should not be taken into account, gave the plaintiff a modified decree. On appeal by the plaintiff, the District Judge of Dinajpore affirmed the decision of the First Court.

*Babu Nilmadhub Bose (Babu Hara Chandra Chuckerbutty with him)* for the appellant. The Court below is wrong in holding

\* Appeal from Appellate Decree No. 1586 of 1900 against the decree of J. Phillimore, District Judge of Dinajpore, dated May 16, 1900.

(1) (1875) 25 W. R. 8.

(2) (1890) Unreported.

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that the agent was not liable to account for the amounts realized by him from the tenants, which were illegal cesses. The case of *Nobin Chunder Roy Chowdhry v. Gooroo Gobind Mojomdar*(1) relied upon does not apply to the facts and circumstances of the present case. The unreported decision of Petheram C. J. in second appeal No. 428 of 1899 is in my favour. Sections 217 and 218 of the Contract Act also lend support to my contention. An agent is bound to pay to his principal all sums received on his account.

*Babu Mohini Mohan Chuckerbutty*, for the respondent, could not support the judgment of the Lower Court, so far as the point of law was concerned, but he argued upon the merits of the case.

**RAMPINI AND HANDLEY JJ.** The suit out of which this appeal arises was brought for an account and for the balance due on accounts being taken from the defendant, who was the plaintiff's agent in collecting rent. When the accounts were taken, it was found that the defendant had collected *khurcha* from the tenants. It is admitted that *khurcha* is an illegal cess. The question, however, is, seeing that the defendant has collected *khurcha* from the tenants, can the plaintiffs recover sums paid on this account to the defendant by the tenants or is the defendant to be allowed to pocket them?

The District Judge has held that the plaintiff cannot recover them from the defendant. The plaintiff appeals and contends that the District Judge is wrong.

The District Judge relies on the ruling in the case of *Nobin Chunder Roy Chowdhry v. Gooroo Gobind Mojomdar*(1), in which it has been laid down that a *tehsildar* is bound to account to the landlord for payments made to him by the tenants in excess of the rents due from them, if made voluntarily. But sums exacted by the *tehsildar* within the meaning of Act X of 1859, s. 10, cannot be recovered by the landlord in a civil suit. The learned Judge says:—"This ruling clearly shows that, notwithstanding section 218 of the Act, IX of 1872, in certain circumstances a *tehsildar* cannot be sued by the landlord for money received in his behalf; and also it shows that cesses which were illegal under

(1) (1875) 25 W. R. 8.

Act X of 1859 could not be recovered from a *tehsildar* by a landlord, but that if they were not illegal under that Act they could be recovered. I think that I am bound by that ruling to hold that cesses which are illegal under the rent law cannot be recovered from the agent by the zemindar."

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It may appear at first sight as if the Judge has not rightly read the judgment, but on further consideration we are disposed to think that the Judges who decided the case meant to lay down that sums which were illegal cesses under Act X of 1859 could not be recovered by a landlord from his agent. But this case was decided under Act X of 1859, and it may be doubted if it was justified by anything to be found in that Act. However that may be, the law has been laid down differently under Act VIII of 1885, in the case of *Gobind Soonder Singh v. Chand Charan Bhattacharjee*(1), No. 428 of 1889, decided on the 15th April 1890 by Petheram C.J., and Banerjee J. The facts of that case were similar to those of the present. As the case is unreported and the point an important one, we quote the judgment in that case *in extenso* :—

"This is a suit brought by a zemindar against his *gomasta* for an account of the moneys collected by the *gomasta* and to compel him to pay over the balance in his hands. The account has been taken; and the present appeal relates to one item of it only. That item amounts to Rs. 96-5-6½; and the accounts furnished by the *gomasta* show that this money has been received by him from the *ryats*. But he states that he did not receive this money as rent at all, but as *mhatoot*. It is contended that this *mhatoot* is not a sum legally recoverable by a zemindar, and should his agent, or the person acting as his agent, collect money from the *ryats* under the name of *mhatoot*, he can keep the money himself and is not bound to pay it to his master in whose name he received it, because he, the master, could not have recovered it by law. This view was adopted by the Munsif and the District Judge; but in that view we cannot agree. True, there is the case of *Nobin Chunder Roy Chowdhry v. Gooroo Gobind Surmah Mojomdar*(2), which contains an expression which favours

(1) (1890) Unreported.

(2) (1870) 14 W. R. 447.

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that view; but that case has been explained by the case of *Nobin Chunder Roy Chowdhry v. Gooreo Gobind Mozoomdar*(1). By that case the operation of the first is limited to the point actually decided there; and the only point decided there is, that in Revenue Courts nothing can be recovered except rent from any person. So the *dictum* in that case with reference to this point is *obiter* only. In our opinion, if a *gomasta*, or any person acting in the character of an agent, gets money into his hands, professing to receive it for his master, he is liable to account for it to his master. The fact that his master could not have enforced payment does not enable the agent to keep it for his own use. To hold such an opinion would be to encourage dishonesty. If a person goes into the service of another to collect money and is entrusted with money while in that service, he is bound to pay his employer, whether he could have enforced its payment by a suit or not. If that were not so, he could keep the money given to him to hand over to his master as a present from the persons from whom he received it. Such a contention cannot prevail. We think, therefore, the view taken by the District Judge is wrong; and that his decision should be reversed with costs. The plaintiff will get a decree for the money,—Rs. 96 and odd annas—in addition to the amount already obtained by him. The respondents will pay the costs of this appeal.”

We see no reason to dissent from the view of the law taken in this Court by the learned Judges who decided this case, and we must accordingly follow it.

The provisions of the section 74 of Bengal Tenancy Act make all *abwab* illegal, and stipulations for their payment void. Under section 75 a tenant can recover double the amount of any *abwab* exacted from him, together with a penalty not exceeding Rs. 200. But no provision in the Act allows an agent to retain the amounts of *abwab* he may have collected or prevents a landlord from recovering them from him. As the District Judge himself has said: “The respective rights and liabilities of the appellant and respondent are fixed by law in Chapter X of Act IX of 1872.” Section 218 of that Act lays down that, subject to the provisions of section 217 of that Act, “the agent is bound to

(1) (1875) 25 W. R. 8.



pay to his principal all sums received on his account;" in the Act there is no exception given to this rule; it would, therefore, at first sight appear from that section that in Indian as in English law an agent is not discharged from accounting to his principal by reason of unlawful acts of the principal in the matter of the agency, and that an agent cannot plead that by reason of the money having been collected under an unlawful agreement which had been made between the principal and the person from whom the money was collected, he is not liable to account for the money to the principal.

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We must therefore set aside the judgment of the Lower Appellate Court and hold that the defendant is liable to pay to the plaintiff any sums collected by the defendant as *khurcha*.

It has been pointed out to us that in these circumstances the case must go back to the First Court, for the Munsif disallowed certain sums for which the defendant produced receipts (A and B), and which he claimed to have paid to the plaintiff's *nait* as *khurcha*. The Munsif held that *khurcha* could not be taken into account at all. If, however, the defendant is liable for *khurcha*, he is entitled to credit for sums paid by him on this account.

We accordingly set aside the decree of the Lower Appellate Court and remand the case to him. The account must now be gone into again, taking *khurcha* into account on both sides.

The appellant is entitled to his costs in this appeal.

*Appeal allowed. Case remanded.*

S. G. G.

## PRIVY COUNCIL.

MAUNG PO HTI

v.

MAHOMED CASSIM.

P.C.\*  
1908  
June 24.

[On appeal from the Chief Court of Lower Burma.]

*Partnership—Deed of partnership—Registration Act (III of 1877), s. 17, cl. (b) and (h)—Clause giving one partner only a right of redemption of mortgaged property—Document giving right to obtain another document—Evidence.*

A deed of partnership which contained a clause stating that the partnership property was mortgaged, and giving one only of the partners a right of redemption for and during a future period of limited duration, was held to declare a right in immoveable property and therefore to need registration under clause (b) of s. 17 of the Registration Act (III of 1877) to make it admissible in evidence.

APPEAL from a judgment and decree (12th August 1901) of the Chief Court of Lower Burma, reversing the decree (18th February 1901) of the District Court of Amherst and dismissing the appellant's suit.

The plaintiff, Maung Po Hti, appealed to His Majesty in Council.

The suit was one for redemption. The 1st and 2nd defendants were the mortgagees members of a Moulmein money-lending firm. The 3rd and 4th defendants were the present respondents, Mahomed Cassim and Adjim Mahomed Nacoda. The facts were that in 1889, at Moulmein, the plaintiff had conveyed, for Rs. 15,000, to another firm, certain immoveable property consisting of a saw-mill and appurtenances, on the verbal understanding that it should be reconveyed to him on repayment of the above sum; that, in June 1897, the plaintiff wished to have the saw-mill reconveyed to him, but, being unable to find the money himself, he sought the assistance of the 3rd and 4th defendants, who agreed to find the money for the re-purchase of the mill and also an additional sum of Rs. 1,000 for expenses, on the following terms: (a) that

\* *Present:* Lord Macnaghten, Lord Davey, Lord Robertson, Sir Andrew Scoble and Sir Arthur Wilson.

the mill should be reconveyed in the names of the plaintiff and the 3rd and 4th defendants; (b) that the plaintiff and the 3rd and 4th defendants should raise a loan of Rs. 12,500 from the 1st and 2nd defendants, on a mortgage of the saw-mill and appurtenances; (c) that the 4th defendant should advance Rs. 3,500 to make up the deficiency; (d) that the plaintiff and the 3rd and 4th defendants should work the mill, as partners, for three years, and for another year if they should further agree; (e) that the plaintiff should have the right of redeeming the saw-mill and obtaining a reconveyance of it from the 1st and 2nd defendants and the 3rd and 4th defendants at any time after the expiration of three years, and before the expiration of four years; (f) that in the event of his failing to exercise that right within the period stipulated, the 3rd and 4th defendants were to be at liberty to redeem the property and have it conveyed to them only.

In pursuance of the above agreement the saw-mill and appurtenances were, on 16th June 1897, conveyed to the plaintiff, and the 3rd and 4th defendants who mortgaged the same to the 1st and 2nd defendants for Rs. 12,500, and on 25th June 1897, the plaintiff and the 3rd and 4th defendants entered into the partnership agreement of which the necessity or otherwise of registration was the only question on this appeal. That question was raised on the following clause in the agreement :—

“That the said saw-mill having been mortgaged with one V. R. S. Nagappa Chetty for Rs. 12,500 by the said Maung Po Hti, Mahomed Cassim and Adjim Mahomed Nacoda, the said Mahomed Cassim and Adjim Mahomed Nacoda, their heirs, executors and administrators, respectively, agree and allow that the said Maung Po Hti, his heirs, executors or administrators to redeem the said premises after the expiration of three years or at any time between three and four years from the date of these presents, on payment of Rs. 12,500 to the said V. R. S. Nagappa Chetty, Rs. 3,500 to the said Adjim Mahomed Nacoda and all other sum of money then due and payable by the said P. A. Mahomed Cassim and Company.”

On 20th June 1900, the plaintiff wished to redeem the mortgaged property, but the 3rd and 4th defendants disputed his right. Hence the suit in which the plaintiff claimed that he was entitled to have the property conveyed to him, on his paying Rs. 12,500 to the 1st and 2nd defendants, and Rs. 3,500 to the 4th defendant, which he was ready and had offered to do.

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The suit was defended only by the 3rd and 4th defendants, the only issue now material being the first:—"whether exhibit I" (the partnership agreement of 25th June 1897), "being unregistered, is admissible in evidence, or in other words, whether it is governed by sub-sec. (b) or by sub-sec. (h) of sec. 17 of the Indian Registration Act?"

As to this issue the District Judge said:—

"I decide this in plaintiff's favour on the ground that exhibit I very clearly did not give plaintiff any present interest, etc., in the land, but merely gave him a *conditional right*, upon making certain payments within specified limits of time, to *obtain documents of title*. It seems to be a document clearly falling under sub-sec. (h)."

In the result he decreed the suit with costs. The 3rd and 4th defendants appealed to the Chief Court of which two Judges (Fox and BIRKS JJ.) heard the appeal and reversed the decision of the District Judge. They said:—

FOX J. The document was not registered. On the 19th July 1900, the plaintiff instituted the suit out of which this appeal arises, in which he sought to redeem the property, and to have it conveyed to him solely, upon his paying into Court the two sums of Rs. 12,500 and Rs. 3,500 mentioned in the clause above set out. He based his right to have the property re-conveyed to him alone on the above clause, and on his having in the previous month intimated to the 3rd and 4th defendants his "readiness and willingness to exercise the right reserved to him of redeeming" the property.

The deed of partnership was tendered in evidence, and its admission was objected to on the ground that sec. 49 of the Registration Act precluded its being received as evidence. The learned Judge of the District Court overruled the objection on the ground that the document was not one which was required by sec. 17 of the Act to be registered. He held that it fell within clause (h), and not under clause (b) of the section, for the reasons that "it did not give the plaintiff any present interest in the land, but merely gave him a conditional right upon making certain payments within specified limits of time, to obtain documents of title."

In my judgment this decision was erroneous. Clause (b) of the section is not confined to documents which create, etc., a present interest in immovable property: it includes "non-testamentary documents which purport or operate to create, declare, assign, limit or extinguish, whether in present or *in future*, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards to or in immovable property." The learned Judge appears to have had in mind the documents of title held by the 1st and 2nd defendants, and a reconveyance from them, when he held that the partnership deed fell within clause (h), and was a document "merely creating a right to obtain another document which will when executed, create, declare, assign, limit or extinguish any such right, title or

interest," i.e., in immoveable property. The document to be obtained, however, must, in my opinion, be one to be obtained from a party to the document in question—in this case from the 3rd and 4th defendants—and the words of the clause cannot refer to any document to be obtained from some one who is not a party to the document or the transaction which it embodies.

In considering whether the partnership deed was admissible or not, it strikes me that the plaintiff is on the horns of a dilemma. The right to redeem was vested jointly in the plaintiff and the 3rd and 4th defendants, unless and until by some means such joint right became extinguished. The deed of partnership either operated to extinguish that joint right and (coupled with the exercise of the option) to vest a sole right to redeem in the plaintiff, or it did not do so. If it did, then it must fall within clause (b) of sec. 17 of the Act, and it was inadmissible in evidence. If it did not do so, but merely created a right to obtain another document which would, when executed, extinguish the joint right and vest the sole right to redeem in the plaintiff, then the plaintiff has not obtained that document from the 3rd and 4th defendants and his suit to redeem from the 1st and 2nd defendants was premature. In either case his suit should have failed.

It has been argued that an equity of redemption is not a right, title, or interest to or in immovable property, but this in my opinion is clearly untenable.

I would allow the appeal and reverse the decree of the Lower Court, and would dismiss the suit with costs.

BIRKS J. I concur in the judgment just delivered by my learned colleague. I was at first doubtful whether the learned Judge in the Court below was in error in holding that the document did not require registration as coming under clause (h) of sec. 17 of the Registration Act. On a reference to the authorities cited, *Chumilal Panalal v. Bomanji Mancherji Modi* (1), *Hormasji Manekji Dada-chanji v. Keshav Purshotam* (2), *Shridhar Ballal Kelkar v. Chintaman Sadashiv Mehendale* (3), *Patel Ranchod Morar v. Bhikabhai Decidas* (4), *Sakharam Krishnaji v. Madan Krishnaji* (5), and *Lakshamma v. Kameswara* (6), I consider that the last ruling is most applicable to the facts. The document in that case contemplated a future division of a portion of the property but did declare existent rights in immoveable property. That appears to be the case here, and that such was the intention of the parties appears clear from the facts that the plaintiff did not consider it necessary to sue for specific performance. Even if it be held that the partnership agreement is admissible under clause (h) as giving the plaintiff a right to claim a release of their shares in the equity of redemption, it is clearly inadmissible in the present suit.

On this appeal,

*H. Cowell* for the appellant contended that the deed did not require registration to make it admissible in evidence. It did not itself "create an interest in immoveable property" within the

(1) (1883) I. L. R. 7 Bom. 310. (4) (1896) I. L. R. 21 Bom. 704.

(2) (1893) I. L. R. 18 Bom. 13. (5) (1881) I. L. R. 5 Bom. 232.

(3) (1893) I. L. R. 18 Bom. 396. (6) (1889) I. L. R. 13 Mad. 281.

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meaning of sec. 17, clause (b) of the Registration Act (III of 1877); but only gave a right to obtain another document under which such an interest would be created. The deed, therefore, it was submitted, fell within clause (h) of sec. 17 as a document expressly excepted from the operation of clause (b). Reference was made to *Chunilal Panalal v. Bomanji Mancherji Modi* (1).

*J. Lewis* for the respondents was not called upon.

The judgment of their Lordships was delivered by

**LORD MACNAGHTEN.** Their Lordships are of opinion that the judgment of the Chief Court is perfectly right. The partnership agreement of the 25th of June 1897, is an instrument falling within section 17, clause (b) of the Indian Registration Act (III of 1877). In one of the clauses of the agreement there is a complete assurance of a right of redemption for and during a future period of limited duration. The clause declares that what, but for this stipulation, would have been the right of the three partners, shall, during that period, be the right of one of the three, exerciseable by him for his own sole benefit. That right is a right in immoveable property. The agreement, therefore, ought to have been registered. Being unregistered, it is inadmissible in evidence. If the agreement had been registered, then, if the respondents had been content to abide by their bargain, no further assurance from them would have been required; if they had contested the appellant's right, a declaration by the Court of his right as expressed in the agreement would have been sufficient, and it would not have been necessary for the Court to make an order directing the execution of any further instrument.

Their Lordships will therefore humbly advise His Majesty that this appeal ought to be dismissed. The appellant must pay the costs of the appeal.

*Appeal dismissed.*

Solicitors for the appellant: *Richardson & Co.*

Solicitors for the respondents: *A. H. Arnould & Son.*

J. V. W.

(1) (1883) 1. L. R. 7 Bom. 810.

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v.

## BANKE BEHARI PERSHAD SINGH.\*

P.C.\*  
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April 30,  
May 1,  
June 19.

[On Appeal from the High Court at Fort William in Bengal.]

*Guardian—Guardian ad litem—Civil Procedure Code (Act XIV of 1882), ss. 443, 578—Absence of formal order appointing guardian—Sanction of appointment by Court—Irregularity—Service of summons on minors, defect in—Substantial representation of minors in suit.*

Under s. 443 of the Civil Procedure Code (Act XIV of 1882) the Court is bound, after satisfying itself of the fact of minority, to appoint a proper person to act on behalf of a minor in the conduct of a suit; and this rule should be strictly followed. But where the Court by its action has given its sanction to the appearance of a person as such a guardian, the absence of a formal order of appointment is not necessarily fatal to the proceedings.

The mother of certain minor defendants appeared throughout the proceedings in a suit as their guardian: the Court admitted the plaint in which she was described as guardian, and in the decree and execution proceedings the Court so described her:—*Held* that, although no formal order appointing her guardian *ad litem* was drawn up, the minors were effectively represented in the suit by their mother and with the sanction of the Court.

The absence of a formal order appointing the mother guardian *ad litem*, and the fact that no attempt was made to serve the minors (members of a joint family) or their mother personally with a summons before serving it on the only adult male member and the manager of the joint family were held, under the circumstances, there being nothing to suggest that the interests of the minors were not duly protected and the defects in procedure not having prejudiced them, to be merely irregularities under s. 578 of the Code of Civil Procedure and not errors fatal to the suit.

*Suresh Chunder Wam Chowdhury v. Jugut Chunder Deb*(1) and *Hari Saran Moitra v. Bhubaneswari Debi*(2) referred to.

APPEAL from a judgment and decree (15th August 1899) of the High Court at Calcutta which reversed a decree (24th

\* *Present*: Lord Macnaghten, Lord Lindley, Sir Andrew Scoble and Sir Arthur Wilson.

(1) (1886) I. L. R. 14 Calc. 204.

(2) (1888) I. L. R. 16 Calc. 40; L. R. 15 I. A. 196.

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December 1896) of the Third Subordinate Judge of Patna, and decreed the respondents' suit.

The three principal defendants appealed to His Majesty in Council.

The suit was brought on 5th January 1895. The plaintiffs, Banke Behari Pershad Singh, Awadh Behari Pershad Singh, and Birj Behari Pershad Singh (the third plaintiff being a minor under the guardianship of the first plaintiff), were three brothers, sons of one Tiluckdhari Singh; and the suit was brought against the present appellants, Bibi Walian, Bibi Batul, and Bibi Bulakun as heirs and representatives of one Mahomed Zahurul Huck, and against Gajadhur Singh and Sidheswar Pershad Singh, two other sons of Tiluckdhari Singh, to recover possession of the plaintiffs' share in mauza Ghasandra in the district of Patna and to have an alleged purchase of the said share by Mahomed Zahurul Huck declared inoperative. The share sued for had been put up for sale in execution of a decree obtained by Mahomed Zahurul Huck in a suit on a mortgage brought by him against Tiluckdhari Singh, and had been purchased on 14th August 1882 by the decree-holder.

The mortgage in question was executed on 28th August 1873 by Tiluckdhari Singh in favour of Wahid Ali (father of Mahomed Zahurul Huck) to secure Rs. 8,000 alleged to have been advanced by Wahid Ali to Tiluckdhari Singh. The present plaintiffs were then minors. Their father Tiluckdhari died in 1880, and in 1881 Mahomed Zahurul Huck brought the suit abovementioned on the mortgage against the present defendant Gajadhur Singh (step-brother of the present plaintiffs) and against the four other sons of Tiluckdhari (the present plaintiffs and the defendant Sidheswar Pershad Singh), the said four sons being uterine brothers, sons of Moti Rani Koer, who was described in that suit as their "mother and guardian," they being then all minors.

An *ex parte* decree was made in that suit on 29th October 1881 directing a sale of the property comprised in the mortgage, and in execution of that decree Mahomed Zahurul Huck obtained possession (together with other property) of the share now sued for.



The plaint stated that the mortgage in question was improperly executed by Tiluckdhari without legal necessity or justification, and for immoral purposes, and that whatever money he received under it was spent for such purposes, none of it being applied for the benefit of the family; that at the date of the mortgage Tiluckdhari and his branch of the family formed part of a joint family of which his elder brother, Baiju Singh, was the *karta* or managing member, the plaintiffs being children of about seven years and under; that the suit on the mortgage (in which the defendant Gajadhur Singh is alleged to have colluded with Mahomed Zahurul Huck) was prosecuted against the present plaintiffs without the appointment or presence in the suit of any guardian on their behalf; that none of the processes in the suit or in execution of the decree were served upon them, or upon any guardian in their behalf, or even upon their mother; and that all the proceedings in the suit, including the sale, were fraudulent. The plaint also stated that Durgā Dutt, the plaintiffs' father's eldest brother, had obtained an order granting him a certificate of guardianship before the proceedings in execution in the mortgage suit were taken.

The defence was that the plaintiffs had no cause of action; that the suit was barred as being *res judicata* by reason of the decree in the mortgage suit; that it was barred by limitation; that Moti Rani Koer was the legal guardian of the plaintiffs in the mortgage suit, and that Durga Dutt Singh never obtained a certificate of guardianship to them, nor ever was their guardian. The defendants also denied any collusion, and alleged that the mortgage was properly executed by Tiluckdhari Singh as the head of the family, that it was executed *bona fide* and to meet legal necessities, and that the money was used for the benefit of the family, and not for immoral purposes. The defendants further maintained the regularity and validity of the proceedings in the mortgage suit, and alleged that they were taken *bona fide* and with the knowledge of the plaintiffs and their guardian.

Issues were raised of which the following only are now material:—

5th.—Whether Tiluckdhari Singh executed the bond, dated 28th August 1873, for illegal and immoral purposes, as alleged in

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the plaint? And are the defendants or the property in suit liable? And was Baiju Singh the managing member of the family?

6th.—Whether the sale in question is liable to be set aside and plaintiffs restored to possession?

7th.—Were the plaintiffs properly represented in the suit and in the execution proceedings taken by Zahurul Huck? If not, are the suit and the proceedings ending in the execution sale void on that ground?

8th.—Were the suit and the proceedings in execution tainted by fraud as alleged in the plaint? If so, are they void on the ground of fraud?

The Subordinate Judge held that the mortgage was executed for the full consideration of Rs. 8,000, and that the money was applied for family purposes and not immorally. He disbelieved the evidence of the plaintiffs as to the dissipated character of Tiluckdhari, and he found that the family was not joint at the date of the bond. As to the proceedings in the mortgage suit he held that Moti Rani Koer was a fit person to be guardian of the minors for that suit and that she was practically appointed as such, although no formal order appointing her was drawn up; that the minors were not prejudiced by Moti Rani Koer's silence as she had no defence to the suit; and that as Durga Dutt did not actually take out the certificate of guardianship under the order appointing him until 29th July 1882, while the sale followed on 14th August 1882, Mahomed Zahurul Huck could not have treated Durga Dutt as guardian on behalf of the minors.

As regarded the service of summonses, &c., which he found were admittedly handed to Gajadthur in the Court compound, the Subordinate Judge held that to be good service on Moti Rani Koer treating Gajadthur as then joint with the minors and their mother, and disbelieving the evidence of the plaintiffs which was adduced to show that Gajadthur had previously separated from them and did not then live with them.

In the result the Subordinate Judge dismissed the suit. The plaintiffs appealed to the High Court, a Division Bench of which (MACPHERSON & WILKINS, JJ.) reversed the decree of the Sub-

ordinate Judge and gave the plaintiffs a decree for their share with mesne profits and costs. In their judgment they said :—

“ The points pressed before us at the hearing of the appeal were three, viz., (1) that the plaintiffs had not been properly represented in the mortgage suit or in the proceedings in execution which followed it ; (2) that no summons had been served upon them, so that the claim was decreed *ex parte* ; and (3) that the Lower Court erred in holding that the minors were not prejudiced because in any case they had no good defence to the suit.

“ In regard to the first point, the Lower Court has found that the suit was substantially against the minors, and that they were properly represented in it by their mother and guardian. That they were sufficiently described in the plaint may be conceded ; but the question is not one of mere misdescription in suits in which minors are sought to be made liable : it is necessary that the Court should see that a proper guardian be appointed to protect their interests. Section 413 of the Code of Civil Procedure is imperative upon this point ; the Court after satisfying itself of the fact of minority, is bound to appoint a proper person to act on behalf of the minor in the conduct of the case. From the proceedings in this mortgage suit, it seems clear to us that the Subordinate Judge never directed his attention to the question of the minority of these defendants or to the appointment of a proper guardian on their behalf ; and there is nothing from which we can presume, as the Lower Court has presumed, that the Court before which the mortgage suit was pending ever sanctioned, expressly or impliedly, the appointment of the minors' mother as their guardian *ad litem* ; and the same defect is emphasised in the proceedings in execution, which resulted in the sale of the mortgaged property, for at that time these minors were under the guardianship of a certificated guardian appointed under Act VIII of 1890.

“ As to the second point, the Lower Court has found that there was a sufficient service of summons upon the minors, a finding from which we must also differ. The only evidence upon this matter is that given by the person who went with the process peon to identify the defendants in the suit, and it is clear from what he says that there was no attempt whatever made to serve the summons upon the minor defendants or even upon their mother, who was their so-called guardian. The peon did not go beyond the precincts of the Court ; and the summons was served upon the minors' eldest brother Gajadhur, who granted a receipt on behalf of all the defendants. Now, though Gajadhur is described in that deposition as the guardian of the three minor defendants, he was certainly not so for the purposes of the suit, even according to their description in the plaint.

“ These being our views of the case, it is unnecessary for us to deal with the third point urged before us. If, as we hold for the reasons above given, the decree is one which is not binding upon the plaintiffs, then it matters little or nothing whether or no they had a good defence to the suit, which they had no proper opportunity of bringing forward. It may be that the plaintiffs' father had no power to mortgage a share in the joint family property during the lifetime, and without the concurrence, of his brother Baiju ; but whether or no he had such power, we think it clear that the share of these plaintiffs cannot be properly held, under the circumstances, to be liable under the mortgage decree, or to have passed by the sale.”

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On this appeal,

*Rattigan K.C.* and *C. W. Arathoon* for the appellants contended that the respondents had been properly represented in the suit on the mortgage bond. They were named in the plaint and in the decree in the suit, and their mother was described both in the decree and plaint as their guardian. Although, therefore, there was nothing to show that there was any formal order appointing her their guardian *ad litem*, yet a presumption under the circumstances could properly be raised that the Court had sanctioned her appearance as guardian. As to the service of summons it was properly made. Gajadhur Pershad Singh on whom the summonses were served was the head of the joint family and its manager, and in that capacity sufficiently represented the minors for the purpose of service of any process in the suit. The procedure in the suit and execution of decree was regularly observed, and the respondents were substantially parties to the suit and execution proceedings. Reference was made to the Civil Procedure Code (Act XIV of 1882), ss. 75, 76, 289 and 443; Mayne's Hindu Law and Usage, 6th Ed., s. 211, page 265; *Hari Saran Moitra v. Bhubaneswari Debi*(1); *Suresh Chunder Wum Chowdhry v. Jugut Chunder Deb*(2); *Kedar Prosunno Lahiri v. Protap Chunder Talukdar*(3); *Vasudeb Marbhat Kale v. Krishnaji Ballal Gokhals*(4); *Jatindra Mohan Poddar v. Srinath Roy*(5); *Durgapersad v. Keshopersad Singh*(6); and *Bhura Mal v. Har Kishen Das*(7). The respondents were not prejudiced in any way by what had taken place. On the findings of fact they had had no defence to the suit in the bond. The want of a formal order appointing their mother guardian *ad litem*, and the fact that the service of summons was not made on her, were not errors vitiating the proceedings, but mere irregularities under s. 578 of the Civil Procedure Code, the existence of which, unless they were shown to have prejudicially affected the minors, would not invalidate the suit or the proceedings following it.

(1) (1888) I. L. R. 16 Calc. 40;  
 L. R. 15 I. A. 195.

(4) (1895) I. L. R. 20 Bom. 534, 536.

(5) (1898) I. L. R. 26 Calc. 267, 272.

(2) (1886) I. L. R. 14 Calc. 204.

(6) (1882) I. L. R. 8 Calc. 656, 661;

(8) (1891) I. L. R. 20 Calc. 11.

L. R. 9 I. A. 27, 30.

(7) (1902) I. L. R. 24 All. 363.

It was also contended that the suit was barred by limitation. It was one to set aside the sale under the decree on the bond, and the period of limitation was that laid down by Art. 12 of Sch. II of the Limitation Act (XV of 1877), namely, one year from the confirmation of the sale. The Limitation Act, s. 8, and the case of *Surja Kumar Dutt v. Arun Chunder Roy*(1), were referred to.

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A. Phillips for the respondents contended that the want of a formal order appointing a guardian *ad litem* for the respondents in the suit on the mortgage bond, and the fact that the summonses and other process were not served on a properly constituted guardian were not merely irregularities under s. 578 of the Civil Procedure Code, but constituted errors going to the root of the suit and affecting it on the merits. The appointment of a guardian *ad litem* was imperative under s. 443 of the Code before the suit could be proceeded with. That the minors were not made parties to the suit, which was the effect of the errors in procedure that had taken place, was an objection going to the very foundation of the suit, which was consequently inoperative and of no effect against the minors—the present respondents; and the sale under a decree in a suit in which they were not properly represented, and were consequently not parties, passed no title to the judgment-creditor, now represented by the appellants. *Ganga Porsad Chowdhry v. Umbica Churn Coondoo*(2); *Hari Saran Moitra v. Bhubaneswari Debi*(3), and *Bhura Mai v. Har Kishan Das*(4) were referred to, the last-named case being one, it was submitted, similar to the present.

Counsel for the appellants was not heard in reply.

The judgment of their Lordships was delivered by

**SIR ARTHUR WILSON.** Tiluckdhari Singh on the 28th June 19. August 1873 executed a mortgage bond in favour of Chowdhry Sheik Wahid Ali to secure a sum of money borrowed from the latter, with interest.

In 1881 Zahurul Huck, the son of Wahid Ali, brought a suit to recover the money due under the mortgage bond, and Tiluckdhari

(1) (1901) I. L. R. 28 Calc. 465, 469. (3) (1888) I. L. R. 16 Calc. 40;

(2) (1887) I. L. R. 14 Calc. 754. L. R. 15 I. A. 195.

(4) (1902) I. L. R. 24 All. 333.

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being then dead, he made defendants Gajadhur, the adult son of Tiluckdhari by one marriage, and Moti Rani Koer, as mother and guardian of four minor sons by another marriage.

On the 29th October 1881, the plaintiff in that suit obtained an *ex parte* decree in his favour, under which the mortgaged property was put up for sale and ultimately purchased by the decree-holder, who was put into possession by the Court on the 8th January 1883.

The present suit was brought in the Court of the Third Subordinate Judge of Patna, the plaint having been ultimately filed on 5th January 1895. The plaintiffs are the younger three of the sons of Tiluckdhari, described as minors in the former suit. The substantial defendants are the representatives of the plaintiff in that suit; the fourth and fifth defendants are Gajadhur, the half-brother of the plaintiffs, who was the adult defendant, and Sidheswar, the elder uterine brother of the plaintiffs, who was one of their minor defendants in the former suit. Of these two it is said in the plaint that, as they are acting in concert with the other defendants, they are made *pro forma* defendants.

The material allegations in the plaint were to the following effect:—That Tiluckdhari borrowed the money raised under the mortgage bond of the 28th August 1873 for immoral purposes, so that his sons were not answerable for the debt; that the former suit, that to enforce the bond, was fraudulently brought and carried through by the then plaintiff in collusion with the plaintiffs' half-brother Gajadhur, the adult defendant in that suit and the fourth defendant in this suit, and that the proceedings in execution and the sale were equally fraudulent. It was further alleged that no summons or other process was served in the suit or execution proceedings upon the present plaintiffs, and that no guardian in the suit was duly appointed for them. On these grounds it was prayed, amongst other things, that it might be held that the auction sale, so far as the plaintiffs' share was concerned, was held in an illegal way, and that Zahurul Huck and the defendants as his heirs acquired no right to the property in dispute; that the auction sale and the decree might be declared inoperative against the plaintiffs; and that the latter might be put in possession of the share claimed by them.

The substantial defendants in their written statements denied all the allegations of the plaint. On these pleadings issues were raised, of which it is only necessary to notice the fifth, sixth, seventh and eighth. The fifth asked, amongst other things, whether the money under the original bond was raised for illegal and immoral purposes. The sixth was whether the sale was liable to be set aside and the plaintiffs restored to possession. The seventh was whether the plaintiffs were properly represented in the suit and execution proceedings, and, if not, whether they were void on that ground. The eighth was whether the suit and proceedings in execution were tainted by fraud as alleged, and, if so, whether they were void on that ground.

It is clear, therefore, that the substantial case of the plaintiffs was a case of fraud; the seventh issue, however, raised a question of a totally different kind, whether the suit and execution were void by reason of defects in procedure.

At the trial before the Subordinate Judge the plaintiffs' main case failed altogether. The Court found that Tiluckdhari's bond was not given for immoral or illegal purposes, so that the debt was binding upon his sons, and that there was no fraud. And those findings have not been impeached.

As to the case based upon defects of procedure in the former suit, the Subordinate Judge held, first, that the then minor defendants (including the present plaintiffs) were parties-defendant to the suit; and the High Court accepted this view, in which their Lordships entirely concur.

The alleged defects which remain are, first, that the present plaintiffs were not properly represented in that suit; that they were not properly served with summons in the suit; and that they were not properly served in the execution proceedings.

As to the first of these points, the mother of the present plaintiffs appears throughout the proceedings in the former suit as their guardian. It is impossible at this distance of time to ascertain positively whether an order appointing her guardian *ad litem* was ever drawn up; but the Subordinate Judge in the present case assumed that there had been none, and he was probably right. An examination, however, of such proceedings in that suit as are forthcoming shows that the Court admitted the plaint in which the

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mother was described as guardian; that in its decree it so described her; and that similar language was used in the execution proceedings. In this connection it is necessary to notice that on the 26th November 1881, Durga Dutt, the uncle of the present plaintiffs, obtained an order for a certificate of guardianship to them, but the certificate was not taken out till the 29th July 1882, long after the decree and the order for sale in execution, and a few days before the actual sale.

As to the alleged defect of service of summons in the former suit, the decree in that suit recites that "by the evidence of the peon who served the summons, and that of the identifier, the service on them" (the defendants in that suit, including the plaintiffs in this) "is proved." The evidence of the peon is not available by reason of the lapse of time, but a deposition of the identifier is in evidence:—"I did not go with the Court's peon to the residence. I identified Gajadthur Singh here in this Court. . . . He took all the summonses and duplicates of the plaint addressed to the defendants, and granted a receipt on behalf of all the four by his own pen. Gajadthur was the guardian of all the three defendants, and he is agent as well." The Subordinate Judge has found that Gajadthur was at that time joint with his minor half-brothers, and there is evidence that he acted as *karta* as of the family, as he naturally would under the circumstances.

The Subordinate Judge held that, though no formal order appointing the mother to be guardian *ad litem* of the infants had been drawn up, the Court must be deemed to have sanctioned the appointment, and that the want of a formal order was at most an irregularity, which could not invalidate the proceedings in the absence of proof of prejudice having accrued to the present plaintiffs, while as to the certificate to Durga Dutt, he held that the date of its issue made it immaterial. As to the service of summons in the suit and of processes in the execution proceedings, the Subordinate Judge arrived at a similar conclusion, and he dismissed the suit.

On appeal to the High Court, that Court conceded that the suit was substantially against the minors; but with reference to the representation of the minors it was said: "It is necessary that



the Court should see that a proper guardian be appointed to protect their interests. Section 443 of the Code of Civil Procedure is imperative upon this point ; the Court after satisfying itself of the fact of minority, is bound to appoint a proper person to act on behalf of the minor in the conduct of the case." In this statement of the law their Lordships entirely concur, and they desire to impress upon all the Courts in India the importance of following strictly the rules laid down in the section referred to. But it is quite another thing to say that a defect in following those rules is necessarily fatal to the proceedings. The High Court, however, considered that there was nothing from which they could presume, as the Lower Court had done, that the Court in the mortgage suit had sanctioned, expressly or impliedly, the appointment of the minors' mother as their guardian *ad litem*; and the learned Judges thought the defect was emphasised in the execution proceedings by the fact of Durga Dutt having obtained the certificate already referred to. They also considered that there had been no sufficient service of summons in the former suit. On these grounds they reversed the decision of the first Court and made a decree in the plaintiffs' favour. Against that decree the present appeal has been brought.

Their Lordships are unable to concur in the conclusion at which the learned Judges arrived. The present plaintiffs were substantially sued in the former suit, and the alleged fraud has been negatived. It appears to their Lordships that they were effectively represented in that suit by their mother, and with the sanction of the Court; and for the reasons given by the first Court their Lordships attach no importance to the certificate of Durga Dutt. There is nothing to suggest that their interests were not duly protected. The only defects which can be pointed out are that no formal order appointing the mother of the now plaintiffs to be their guardian *ad litem* is shown to have been drawn up; and that it is not definitely shown that any attempt was made to serve the summons in the former suit upon the infants personally, or upon their mother, a *purdanashin* lady, before serving it upon Gajadhur, the only adult male member and the *karta* of the family. It has not been shown that the alleged irregularities caused any prejudice to the present plaintiffs; nor indeed could

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there well be any, since it has been found that the original debt was one for which the present plaintiffs were liable.

Their Lordships are of opinion that the defects of procedure alleged in this case are at most irregularities which, under s. 578 of the Civil Procedure Code, would not have furnished ground for reversing the proceedings in the former suit, if they had been raised upon appeal in that suit. This is in accordance with the ruling of a Full Bench of the Calcutta High Court in *Suresh Chunder Wum Chowdhry v. Jugut Chunder Deb*(1), approved by this Board in *Hari Suran Moitra v. Bhubaneswari Debi*(2), and with the decision in the last-mentioned case. And the plaintiffs who have brought a separate suit to set aside the judgment and execution proceedings in the former suit and the title acquired under them can certainly not be in a better position than if they had been appellants in that suit.

Their Lordships will humbly advise His Majesty that the decree of the High Court should be set aside with costs and the decree of the Subordinate Judge restored. The respondents will pay the costs of this appeal.

*Appeal allowed.*

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitor for the respondents: *G. C. Farr.*

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(1) (1886) I. L. R. 14 Calc. 204.

(2) (1888) I. L. R. 16 Calc. 40 ; L. R. 15 I. A. 195, 200.

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P. C.\*  
1903May 7, 8;  
June 24.

[On appeal from the High Court at Fort William in Bengal.]

*Evidence—Road-cess Returns—Returns made under s. 95, Bengal Cess Act (Bengal Act IX of 1880)—Admissibility in Evidence—Grounds of Enhancement of rent—"Fair and equitable rates"—Presumption against person not producing evidence which he can produce—Evidence Act (I of 1872) s. 114(g).*

In a suit for enhancement of the rent of a taluqdari tenure road-cess returns rendered under s. 95 of the Bengal Cess Act (Bengal Act IX of 1880), though not conclusive, were held to be admissible in evidence as a basis on which to ascertain the assets of the taluq, and so fix a fair and equitable limit of enhancement.

When such returns, produced by the plaintiff, showed that the taluqdars were receiving from their sub-tenants a considerably higher rent relative than that which they were paying to their superior landlords, and that the claim for enhancement could *prima facie* be supported on the ground that the existing rate was consequently not "fair and equitable" within the meaning of the Bengal Tenancy Act, they were held sufficient to shift the onus to the defendants to rebut the presumption so raised against them. To rebut such presumption the defendants might have produced their collection papers, but did not do so:—

*Held*, that the Court was justified in acting on the presumption under s. 114 (g) of the Evidence Act (I of 1872).

CONSOLIDATED appeals 34 and 35 of 1899 against two judgments and three decrees (12th May 1899) of the High Court at Calcutta whereby two decrees (31st July 1895 and 31st January 1896) of the Subordinate Judge of Mymensingh in favour of the appellant in two suits (27 of 1890 and 12 of 1895) were reversed.

The plaintiff, Hem Chandra Chowdhry, appealed to His Majesty in Council.

The suits out of which these appeals arose were brought under the following circumstances. The Perganah Pukhuria Jainsahi originally formed one entire zemindari estate. Subsequently it was partitioned and became owned and possessed in the following shares, each of which constitutes a separate unit for revenue assessment without the lands themselves having been divided among the co-sharers: (i) a 10 anna share known as No. 122; (ii) a 2 anna

\* *Present*: Lord Macnaghten, Lord Lindley, Sir Andrew Scoble and Sir Arthur Wilson.

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share known as No 4806 ; (iii) a 2 anna share known as No. 5513 ; and (iv) a 2 anna share the number not known. The share No. 122 is owned by Hemanta Kumari Debi, widow of Jotindra Narain Rai, whose mother Sarat Sundari Debi was in possession before him. The shares Nos. 4806 and 5513 are owned by the appellant Hem Chandra Chowdhry. The name of the owner of the remaining 2 anna share does not appear from the record.

In the Perganah Pukhuria Jainsahi there existed one subordinate taluqdari tenure called Madarjani which was owned and possessed by all the respondents and one Guna Misser ; and as between themselves a partition had been made under which Guna Misser was in possession of a 2 annas 5 gunda share, and the remaining 13 annas 15 gunda share was in the possession of the respondents jointly.

Disputes had arisen at various times between the zemindars and the taluqdars as to the right of the former to enhance the rent as between the appellant and the respondents. These disputes were settled by a judgment of the High Court at Calcutta in suit No. 14 of 1882 which declared that the respondents' tenure was of a nature liable in law to enhancement of rent.

The first of the suits now under appeal (27 of 1890) was brought by the appellant on 12th December 1890 against the taluqdars of the 13 annas 15 gunda share, claiming to enhance the rent previously paid, and to recover rent from the beginning of the Bengali year 1298 at an enhanced rate of Rs. 2,788-12 per annum, together with increased cesses at the rate of Rs. 184-7-6 per annum.

Of the 23 defendants only defendants 1, 2 and 3, Kali Prosanna Bhaduri, Jogesh Prosanna Bhaduri, and Girindra Nath Bhaduri, defendant 14, Mohim Chunder Bhaduri, and defendant 23, Hemanta Kumari Debi, appeared and filed written statements. The main grounds of defence were (1) that the suit was not maintainable without notice of enhancement ; (2) that the defendants' holding was not a tenure within the meaning of the Bengal Tenancy Act, the rent of which could be enhanced ; (3) that the plaintiff being only a sharer in the rents of the taluq could not sue alone to enhance the rent ; and (4) that under no circumstances did a proper case exist for enhancement of the rent.

On 13th December 1890 the appellant brought a similar suit (No. 7 of 1891) for enhancement of rent against Guna Misser, the owner of the remaining 2 annas 5 gunda share in the taluqdari tenure. This was transferred to the Court of the Subordinate Judge of Mymensingh who, as both suits raised the same questions for decision, tried them together and disposed of them by one judgment. Both parties produced oral and documentary evidence to prove the rates at which the lands were let to the actual cultivators; and also to prove the actual collections made by the taluqdars from the tenants. None of the defendants produced accounts, as they could have done, showing the amount of rents actually realised and realisable by them. Defendants 1, 2 and 3 in suit 27 of 1890 produced some counterfoils of receipts for rent alleged to have been given to the tenants, but these were found by the Subordinate Judge to be forgeries. The plaintiff in proof of the gross rents filed certain road-cess returns made under the provisions of Bengal Act IX of 1880, as amended by Act II of 1881. Every holder of an estate or tenure is required by s. 14 of that Act when called upon to do so, to make a return in a specified form of the "total revenue or rent which is payable, or, if no revenue or rent is actually payable, what would, on a reasonable assessment, be payable by all the cultivating raiyats of such estates or tenure or by other persons in the actual use and occupation thereof." The Act provides measures to secure the accuracy of the said returns.

The Subordinate Judge held that notice of enhancement was not necessary, that the plaintiff could sue alone for the enhancement, that the defendants' taluq was a tenure as defined in the Bengal Tenancy Act; and that its liability to be enhanced was conclusively decided by the judgment of the High Court of 30th November 1888. He therefore proceeded to consider what would be a fair and equitable enhancement in accordance with s. 7 of the Bengal Tenancy Act and to determine the amount of the gross collections for that purpose. He was of opinion that the evidence as to the rates of rent realisable were unsatisfactory; that the defendants had suppressed their books of accounts which would show the rents actually realised by them; and that the road-cess returns furnished a reliable basis for calculating the gross collections of the whole tenure, the more especially, as the evidence for

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the defendants showed that the raiyats paid all the sharers in the tenure at the same rate.

In the result he gave the plaintiff a decree for rent at an enhanced rate, but not to the extent claimed in the plaint, and not for the Bengali year 1298.

From this decree four appeals were filed in the Court of the District Judge of Mymensingh: one by defendants 1, 2, 3 and 14 in suit 27 of 1890, one by Guna Misser, and two by the plaintiff. The appeals of the defendants were against the decree so far as it directed enhancement at all; while the plaintiff appealed against the enhancement not being extended to the amount claimed by him, and also on the ground that a decree for rent for the Bengali year 1298 should have been passed in his favour.

These appeals were by order transferred to the High Court and heard together by a Division Bench of that Court (MACPHERSON and STEVENS JJ.).

That Court was of opinion that the rent of the tenure was liable to enhancement, and that the plaintiff alone could maintain the suit to enhance the rent. On the question of the extent of the enhancement the Court took the same view as the Subordinate Judge as to the value of the oral evidence. To determine what the gross collections were and whether the rent was fair and equitable the High Court rejected some of the road-cess returns as inadmissible in evidence, and was of opinion that the remaining exhibits were of very little value, not even of sufficient weight to shift on the defendants the burden of proving what the actual gross collections were. As to these the High Court said:

"The road-cess returns are exhibits 1 to 4 and 6 and 7. None of these were submitted by the appellants, and exhibits 3, 4, 6 and 7 relate not to the tenancy under either of the plaintiff's estates, but to the tenancy under estate No. 122, which represents the 10 annas share of the pergunah, and are, we consider, on that ground inadmissible. We cannot hold that there is a separate and distinct tenancy under the plaintiff as proprietor of one estate so as to admit of his enhancing the rent payable to him, and at the same time hold that there is one and the same tenancy under him and the proprietors of estate No. 122, so as to make a statement relating to the tenancy under the latter estate admissible. If the tenancies are distinct, the statement to be admissible must, we think, relate to the tenancy which is in question. In this view all but Exs. 1 and 2 must be excluded, but it is upon those and Ex. No. 3 that the Subordinate Judge has acted.

"Exhibits 1 and 2 are returns relating to the plaintiff's estates Nos. 5513 and 4806 respectively. They were signed and submitted by Hari Narain Ghose as am-mokhtar of Raja Jotindra Narain Roy, whose interest has now devolved on his widow Rani Hemanta Kumari, the 23rd defendant in the suit, but not a contesting defendant. They show that in 1884 Jotindra Narain's 11 gundas 2 cowries share of the tenure was let out in ijara for terms of three or four years to certain persons at an aggregate rent of Rs. 54 annas 2 pies 4 as regards each of those estates. Exhibit 3 is a return which, as already stated, relates to estate No. 122. It was signed and submitted by Harendra Kumar Bose as am-mokhtar of Maharani Sarat Sundari Debi, who was the mother of Jotindra Narain and whose share has also now devolved on Hemanta Kumari; and it shows that her 1 anna 14 gundas 2 cowries share of the tenure appertaining to estate No. 122 was let out to the ijaradars mentioned in Exs. 1 and 2 at an annual rent of Rs. 813 annas 18. Those returns have been made evidence against the appellants under cl. 3, s. 32 of the Evidence Act, as containing statements made by a deceased person against his pecuniary interest; and it is on them alone that the assets of the four anna share of the tenure appertaining to the plaintiff's estates has been determined and the rent enhanced. The statements made in the returns were no doubt authorized by the Rani and the Raja respectively, and, under the provisions of the Road Cess Act were binding on them; but looking at the language and scope of s. 32, we doubt whether they can be regarded as statements made by those persons within the meaning of the section so as to be admissible against others. It is not, we think, necessary to determine this question in the present case, because, assuming that the statements are evidence against the appellants, they do not in our opinion furnish any reliable data for ascertaining the assets of the tenure, and have been given a value far beyond what they deserve.

The statements do not purport to give the rent realized in respect of the whole tenure, or to deal with more than the small shares owned by the Raja and the Rani. It was therefore necessary to resort to a mathematical calculation, which must have assumed two things,—first, that the ijaras were not of a speculative character and that the ijaradars realized from the raiyats at least the amount of rent which they paid to the superior landlord, and, secondly, that the other tenure-holders, including the appellants, realized, proportionately to the shares, the same amount of rent either from the same or other ijaradar or from the raiyats direct. We see no ground for either assumption. The returns stand by themselves, and beyond some general evidence that the raiyats paid all the tenure-holders at the same rates, whatever those rates were, there is no evidence in support of them. Then the Rani and the Raja occupied the double position of tenure-holder and proprietor, for they were proprietors of estate No. 122. The Subordinate Judge says that the history of the previous litigation shows a determined effort on the part of the proprietors to enhance the rent of the tenure, but that there was admittedly some decision which protected the share of the tenure subordinate to estate No. 122 from enhancement, so that the Rani and the Raja would derive no advantage as proprietors by overstating the amount of the rent received by them as tenure-holders. We do not know what that decision is, but the fact that they occupied the double position remains, and certainly detracts from the value of the statements as affecting other sharers of the tenure. The argument that the statements carry some weight from the position

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of the persons making them might be of some force if it was shown that they had personal knowledge of them. This is not shown; all that appears is that the mokhtars received the returns from the amlah and signed and put them in, and it is not likely that either the Rani or the Raja would have been able to say anything about the correctness of them. The returns are certainly *prima facie* against pecuniary interest; but the pecuniary interest is so small that they have little value on that ground. On the other hand, notwithstanding the provisions of ss. 21 and 32 of the Evidence Act, they could not, under s. 95 of the Road Cess Act, be used as evidence in favour of the person submitting them. As the case stands on the judgment of the Subordinate Judge, it is in the same position as if the plaintiff had put in and proved these returns, and no other evidence of any kind had been given. In our opinion this is not sufficient, and no decree for enhanced rent could be made on the strength of them. It is argued that it was in the power of the appellants to prove the amount of rent realized in respect of the tenure; but, conceding that it was for the plaintiff to start his case by proving under s. 7 of the Tenancy Act that the existing rent was below the customary rate payable by persons holding similar tenures in the vicinity, or that it was not a fair and equitable rent: statements of other persons, such as those relied on, are not sufficient to throw on the appellants the burden of proving that the existing rent is fair and equitable."

In the result the High Court, having found that there was no evidence to show that the present rent was not fair and equitable allowed the defendants' appeal, rejected the appeal of the plaintiff and dismissed the suit with costs. In the appeals in suit 7 of 1891 the High Court confirmed the judgment of the Subordinate Judge dismissing both appeals with costs; and no further appeal by either party was preferred.

The second of the consolidated appeals (35 of 1899) arose as follows: The Subordinate Judge of Mymensingh by his judgment of 31st July 1895 declared the right of the plaintiff to recover rent from the defendants at a certain enhanced rate. On 20th November 1895 the plaintiff filed suit 12 of 1895 against the defendants to recover rent from them at such enhanced rate from April 1891 to October 1895, thus including in the suit a claim to rent for a portion of the Bengali year 1298. On 31st January 1896 the Subordinate Judge decreed in favour of the appellant for the rent claimed at the enhanced rate except for the year 1298, holding that the claim for rent of that year having been included in the previous suit, 27 of 1890, the claim to that year's rent was barred by s. 12 of the Civil Procedure Code.



From that decree both parties appealed to the High Court. That Court delivered judgment on the 12th May 1899 and decided that the claim to rent for the year 1298 was not barred by s. 12 of the Civil Procedure Code, but was barred by the law of limitation, inasmuch as the suit had been instituted more than three years after the last day of the Bengali year in which the arrears for that year had fallen due. Relying on their previous judgment on appeal in suit 27 of 1890, the High Court held that no enhanced rent was claimable, and that Court accordingly dismissed the plaintiff's appeal with costs and remanded the case to the Subordinate Judge to determine the amount of rent due.

In these appeals from the judgment and decrees of the High Court on appeal in suits 27 of 1890 and 12 of 1895, the plaintiff appealed to His Majesty in Council.

*Mayne and De Gruyther* for the appellant contended in appeal 34 of 1899 that the road-cess returns were admissible in evidence to show what the assets of the zamindari estate were. Some of them the High Court had wrongly rejected and had found that others were of little or no value as evidence to determine the amount of the gross collections of the taluqdari tenure. It was submitted they were admissible in evidence. They were made under the provisions of s. 14 of the Bengal Cess Act (IX of 1880 as amended by Bengal Act II of 1881), and were records which would be admissible to show the assets of the tenure. Reference was made to ss. 6, 14, 17, 21 and 34 of Act IX of 1880. The Evidence Act (I of 1872), s. 32, cls. (2) and (3) and s. 35. There was evidence that some of the persons who made them were dead. They were also, it was submitted, sufficient if admitted to prove such gross collections, or at least to shift the onus on to the defendants, who had accounts which they might have produced, but did not to prove them. The Evidence Act (I of 1872), ss. 106 and 114 (*u*) were referred to, as to the burden of proof of matters within the particular knowledge of any person, and as to the presumption which the Court might make as to evidence which could have been, and was not, produced.

In appeal 35 of 1899 it was contended that the suit was not barred by limitation, and the Bengal Tenancy Act (VIII of 1885),

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s. 154 and Sch. III, cl 2(4) were referred to. The High Court ought to have given the plaintiff a decree for rent either at an enhanced rate, or, if not, at the rate admittedly previously paid.

*C. W. Arathoon* for the respondents contended that the road-cess returns were not admissible in evidence against the respondents. They were not public documents within the meaning of s. 35 of the Evidence Act. Even if admitted they were not sufficient to support the decree for enhancement. It was also contended that the tenure was not liable to enhancement at all, and *Hurronath Roy v. Gobind Chunder Dutt* (1) was referred to. The decree of the High Court of 30th November 1888 was not sufficient, it was submitted, to entitle the plaintiff to enhance the rent of the tenure. It was only a declaratory decree, and more than that was needed to make out the liability of the tenure to be assessed with enhanced rent. Reference was made to ss. 6 and 50 of the Bengal Tenancy Act (VIII of 1885), and it was submitted that none of the grounds for enhancement there laid down had been shown to exist.

In suit 12 of 1895 the High Court was right in holding that it was barred by limitation.

*Mayne* replied.

The judgment of their Lordships was delivered by

June 24.

**SIR ANDREW SCOTTE.** The appellant, Hem Chandra Chowdhry, is the owner of a four anna share in the Pergana Pukhuria Jainsahi, which originally formed one entire zemindari estate. In this Pergana there has long existed a subordinate talookdari tenure known as Madarjani, which is owned and possessed by the respondents and one Guna Misser, who is not a party to the present appeals. The questions for determination are—(i) whether the appellant has made out his claim to the enhancement of rent allowed by the Subordinate Judge, and (ii) from what date that enhanced rent is claimable.

For many years the right of the zemindar to enhance the rent of this taluq has been a subject of contest in the Indian Courts, but it was ultimately established by a decree of the High Court at Calcutta, which decided, on the 30th November 1888, that the

(1) (1875) 15 B. L. R. 120; L. R. 2 I. A. 193.

tenure held by the respondents was of a nature liable in law to an enhancement of rent. From this decree no appeal was preferred, and their Lordships must hold that it is now too late to re-open the question. It remains to be considered, however, whether in the suits to which the present appeals relate, the appellant has made out his claim, in fact, to the enhancement which he seeks. The Subordinate Judge found in favour of the appellant on this point, but his decree was reversed by the High Court.

Under s. 7 of the Bengal Tenancy Act (VIII of 1885), where the rent of a tenure-holder is liable to enhancement (as is the case here), it may, "subject to any contract between the parties, be enhanced up to the limit of the customary rate payable by persons holding similar tenures in the vicinity;" or, "where no such customary rate exists, it may, subject as aforesaid, be enhanced up to such limit as the Court thinks fair and equitable." The Subordinate Judge found that the plaintiff had failed to prove the existence of any customary rate, and accordingly proceeded to ascertain, by an examination of the evidence before him, the limit to which the rent might be fairly and equitably enhanced, there being no contract to fix that limit.

The evidence, as is not infrequent in cases of this kind, was of a most unsatisfactory character. "Numerous witnesses," says the Subordinate Judge, "have been examined by both parties to depose to the rates alleged by them, but none of them appears to be reliable." Much of the documentary evidence he considered equally worthless. And the High Court concurred in this appreciation.

Some road-cess returns were, however, put in by the appellant which the Subordinate Judge regarded as sufficiently trustworthy to afford a basis upon which to ascertain the assets of the taluq, and thus to fix a fair and equitable limit of enhancement. These returns are rendered under Bengal Act IX of 1880, s. 95 of which makes them admissible in evidence against the person by or on behalf of whom they were filed. It is also contended that, on other grounds, some of them are relevant evidence under the Indian Evidence Act.

It is admitted that two of these returns relate to the particular portion of the zemindari held by the appellant. They were filed

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on behalf of Raja Jotindra Narain Roy, who is now dead, and whose widow, the respondent Rani Hemanta Kumari Debi, is one of the taluqdari tenants, as well as the owner of a 10 anna share in the whole zemindari. They show that, in 1884, Raja Jotindra's fractional share in the taluqdari tenure was let out on lease for terms of three or four years to certain persons, at an aggregate rent of Rs. 108-4-8, to which must be added Rs. 4-9-0 for the value of the taluqdar's *nij* share of khamar land, making the total value of the Raja's share Rs. 112-13-8 per annum. Adopting this figure as a fair statement of what the taluqdars generally received from their lessees as rent on account of their holdings in the taluq, the Subordinate Judge worked out a rule-of-three sum which brought the rent received by the taluqdars in respect of the appellant's four anna share in the zemindari to Rs. 3,140-6-0; and, after making usual deductions for expenses and collection charges, he fixed the enhanced rent payable to the appellant at Rs. 2,386-11-0 in respect of the portion of the two estates in question in the suit.

The learned Judges of the High Court dissented from this method of dealing with the case. The road-cess return did not, in their opinion, "furnish any reliable data for ascertaining the assets of the tenure;" and they held that the mathematical calculation made by the Subordinate Judge rested on two assumptions, for neither of which they saw any ground. It is quite true that the returns are not conclusive evidence; but, so far as they go, they undoubtedly show that the taluqdars were receiving from their sub-tenants a considerably higher rent relatively than that which they were paying to their superior landlord, and that the claim for enhancement could *prima facie* be supported on the ground that the existing rate was consequently not "fair and equitable" within the meaning of the Bengal Tenancy Act. In the opinion of their Lordships, this evidence was sufficient to shift the onus to the respondents, in whose power it was, by producing their collection papers, to rebut any presumption raised against them by the road-cess returns. But for reasons best known to themselves, they did not produce any documentary evidence on which reliance could be placed. On the contrary, they put in certain counter-foils of receipts alleged to have been granted to their raiyats; and

these the Subordinate Judge found to have been fabricated for the purposes of the suit. Under s. 114 (g) of the Indian Evidence Act (No. I of 1872), the Court may presume that "evidence which could be, and is not, produced would, if produced, be unfavourable to the person who withholds it;" and their Lordships consider that, in the circumstances of the case, the Subordinate Judge was fully justified in coming to the conclusion which he formed upon the only evidence before him which he regarded as reliable.

The decree of the Subordinate Judge was made on the 31st July 1895, and awarded the enhanced rate prospectively from the end of the Fasli year 1298. On the 20th November 1895 the appellant filed a suit against the respondents to recover the arrears of rent due for 1298. The Subordinate Judge held that the claim was barred by s. 12 of the Civil Procedure Code, but not by the law of limitation. The High Court, on appeal, came to the precisely opposite view. In the opinion of their Lordships the proceedings in the earlier suit stayed the operation of the law of limitation; and as the appellant claimed the arrears of 1298 in that suit, but his claim was then disallowed as premature, he is now entitled to the benefit of the decree for enhancement and to recover the arrears at the enhanced rate. The decree of the Subordinate Judge, in which he ascertained the amount due for arrears at that rate, but postponed execution until the final decision of the enhancement suit, can therefore be sustained.

Their Lordships will humbly advise His Majesty that the decree of the High Court in both suits should be set aside with costs, and those of the Subordinate Judge affirmed. The respondents will pay the appellant's costs of the appeals, except that the parties will pay their own costs of the petition lodged by the appellant for leave to refer at the hearing to certain documents.

Appeals allowed.

Solicitors for the appellant: *Watkins & Lempriere.*

Solicitors for the respondents: *T. L. Wilson & Co.*

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1903

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Representative of deceased person—Decree-holder—Judgment-debtor—Substitution of heir-at-law and residuary legatee as legal representative—Residuary legatee in possession, effect of—Executor de son tort—Probate and Administration Act (V of 1881) ss. 4, 12, 14, 15, 19, 33, 32, 187—Succession Act (X of 1865) s. 190—Civil Procedure Code Act (XIV of 1882) s. 234.

Pending the execution of a decree, the judgment-debtor died, leaving a will under which R. K. was the residuary legatee. He took possession of the estate, and applied for letters of administration with the will annexed. The will was ultimately found to be true, and letters ordered to be granted. In the meantime, R. K. and the heir-at-law were substituted in place of the judgment-debtor in the execution proceedings, and an order was made between the parties in the matter of the execution:—

Held, that the order was a good and binding order.

Held, further, that a residuary legatee in possession of the estate of a deceased judgment-debtor could not be regarded as an executor *de son tort*, so that his acts would not be binding upon the legal representative.

Prosunno Chunder Bhattacharjee v. Kristo Chytunno Pal(1), *Janaki v. Dhanu Lall*(2), *Chathaksan v. Govinda Karumiar*(3), referred to.

APPEAL by Chuni Lal Bose, administrator to the estate of Raja Ran Bahadoor Singh, deceased.

One Rani Asmed Koer, widow of Raja Modh Narain Singh, deceased, executed a mortgage bond on the 11th November 1870 in favour of one Rai Narain Das. Two years afterwards Rai Narain Das brought a suit against Rani Asmed Koer for the recovery of the debts due upon the mortgage bond, and Raja Ran Bahadoor Singh being the reversionary heir was brought on the record as defendant under the provisions of s. 73 of the Civil Procedure Code of 1859,

* Appeal from Order No. 324 of 1902 against the Order of Upendra Nath Bose, Subordinate Judge of Gaya dated July 16, 1902.

(1) (1878) I. L. R. 4 Calc. 342. (2) (1891) I. L. R. 14 Mad. 454.

(3) (1899) I. L. R. 17 Mad. 186.

and a compromise was come to between the parties, upon which a consent decree was passed on the 29th March 1873. Under this decree the judgment-debtors were to pay Rs. 2,38,000 to the decree holder by a yearly instalment of Rs. 30,000 at the end of Bhadro every year, with interest at eight annas per cent. under certain contingencies, and with interest at one rupee per cent. under certain other contingencies. The decree-holder upon this decree was entitled to realise the whole of the decretal amount at once, in case default was made in the payment of two consecutively successive instalments.

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Rani Asmed Koer after the aforesaid consent decree was passed surrendered the estate of her late husband in favour of his nephew and nearest kinsman Raja Ran Bahadoor Singh.

After certain payments had been made towards the satisfaction of this decree, Raja Ran Bahadoor Singh, on the 31st March 1890 died leaving no male issue, but leaving a will dated the 23rd, March 1890, whereby he bequeathed all his property to his deceased son's daughter, Raj Kumari Ratan Koer, with the exception of ten villages which he left as a legacy to his son's widow Musammat Rameswar Koer, for her maintenance till her death.

Raj Kumari Ratan Koer, after her grand-father, Raja Ran Bahadoor Singh's death, applied for probate of his will to the District Court at Gya. The District Judge of Gya by his judgment dated the 16th February 1891, pronounced the will to be false, and rejected her application for probate. On appeal the Calcutta High Court set aside the judgment of the District Judge of Gya, and pronounced the will to be a genuine document, and by its judgment dated the 1st September 1891, ordered grant of probate to Raj Kumari Ratan Koer. An appeal was then preferred to the Privy Council which by an order dated 18th December 1894 confirmed the judgment of the High Court.

On the 21st May 1895, Raj Kumari Ratan Koer died, before obtaining probate, leaving no male issue, and by her will she demised all her properties obtained from Raja Ran Bahadoor Singh, to her only daughter, Raj Kumari Bhubaneswari Koer, and appointed her mother, Rameswar Koer, executrix, and her husband, Rajeswari Pershad Narayan Singh, executor, under the will. In January 1897 Rajeswari Pershad Narain Singh died,

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shortly after probate of the will of Rajkumari Koer had been granted to him and his mother-in-law, Rameswar Koer.

Subsequently, on the 18th December 1899, proceedings were taken out against Raja Ran Bahadoor Singh for execution of the consent decree of the 29th March 1873, and accounts were prepared showing the amount due to the decree-holder. The original decree-holder, Rai Narayan Das, having died, his son, Rai Balkishen Das, was substituted as decree-holder. After the death of Rai Balkishen Das, his sons, Rai Sham Kishen Das, Rai Batey Kishen Das and Rai Kishen Das, were substituted as decree-holders, and they, by a registered conveyance dated the 3rd July 1901, sold the decree of the 29th March 1873 to Dakshina Mohan Roy. Dakshina Mohan Roy, by an application dated the 27th March 1901, and filed in Court on the 28th March 1901, asked for an order substituting himself as decree-holder, and for a further order substituting one Chuni Lal Bose as administrator to the estate of the deceased judgment-debtor, Raja Ran Bahadoor Singh, he, Chuni Lal Bose, having had letters of administration of the estate of Raja Ran Bahadoor Singh, deceased, granted to him on the 16th March 1901.

By an order of the Court dated the 25th May 1901, the above substitution of names of decree-holder and judgment-debtor was made.

Dakshina Mohan Roy then died, and Mr. Osmond Beeby was appointed administrator *pendente lite* to the estate of the deceased by the High Court, and he applied to the High Court to be substituted as a decree-holder in the present case and to be allowed to prosecute these proceedings. Notice was then served upon Chuni Lal Bose to show cause why Mr. Osmond Beeby should not be brought on the record as the substituted decree-holder, and why he should not be allowed to prosecute these execution proceedings, and no objection being raised by Chuni Lal Bose, Mr. Osmond Beeby was brought on the record as the substitutes decree-holder on the 11th April 1902. On the 8th May 1902, Chuni Lal Bose filed a petition of objection, stating that the account prepared by the Court on the 7th May 1890, after the death of Raja Ran Bahadoor Singh, was incorrect; and on the 2nd July 1902 he filed a further petition of objection raising the

plea of limitation, and contended that under s. 187 of the Probate and Administration Act, Raj Kumari Ratan Koer was not the legal representative of the deceased, Raja Ran Bahadoor Singh, deceased, as she died before she could obtain Letters of Administration ordered to be granted to her by the High Court and by the Privy Council. The Subordinate Judge held that s. 187 of the Probate and Administration Act did not apply, and that that section was no bar to other persons recognizing an executor or legatee as such when they found that the will left could not be ignored; that Raj Kumari Ratan Koer had prior to her death in a petition of objection dated the 29th November 1893, and filed on the 29th November 1893, admitted in the execution suit (No. 123 of 1893) that under the will of Raja Ran Bahadoor Singh she was in possession of all property left her, but had objected that she was not the legal representative of Raja Ran Bahadoor Singh; but the Subordinate Judge had, by his order dated the 9th July 1894, decided against Raj Kumari Ratan Koer. She then had preferred an appeal against that order, but died pending that appeal. Then Rameswar Koer and Rajeswar Pershad Narayan Singh, the husband of Raj Kumari Ratan Koer, had their names substituted in her place, and the High Court by its judgment dated the 2nd January 1896 held, that the mother and husband did not properly represent the estate of Raja Ran Bahadoor Singh, and were not the representatives of Ratan Koer, and that the appeal had abated, and therefore they dismissed the appeal. Consequently the order of the 9th July 1894 became final between the parties. The Subordinate Judge further held that the parties were bound by the account prepared on the 7th May 1890, and therefore he rejected the petition filed by Chuni Lal Bose.

From this decision Chuni Lal Bose appealed.

Mr. Hill (Babu Umukali Mukerjee and Babu Lachmi Narain April 14, 27. Singh with him) for the appellant. The precise point in this case is, that during the execution proceedings after the death of Ran Bahadur, his estate was never represented. Previous to the passing of the Hindu Wills Act of 1870, an executor of a Hindu's will was in the position of a manager, and it was only upon

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that Act coming into force that the executor represented the estate. An administrator's position is, however, very different.

Where a testator leaves property without appointing an executor, but leaving a residuary legatee, the residuary legatee can take out Letters of Administration under s. 19 of the Probate and Administration Act. An executor takes his title by the will, but an administrator, or administrator with the will annexed, takes his title under the Letters of Administration.

An executor must produce probate, and an administrator the letters of administration: see s. 12 of the Probate and Administration Act. Ss. 14 and 15 of this Act deal with the position of an administrator. There is therefore a wide distinction drawn between an executor who obtains probate and an administrator who obtains Letters of Administration.

The position of Ratan Koer was that of a residuary legatee, who, in the absence of an executor, would be entitled to obtain Letters of Administration under s. 19 of the Probate and Administration Act: *Chotey Narain Singh v. Ratan Koer*(1).

In the present case letters of administration had not been taken out.

The execution proceedings abated when Ran Bahadur died, as there was no one to represent his estate: see s. 368 of the Civil Procedure Code. Even if the legal heir and residuary legatee were made parties, that would not make them represent the estate. Neither of these parties took any steps to protect the estate, and the order of the 7th May 1890 was then passed.

As to the position of an administrator, see *Woolley v. Clark*(2) and *Humphreys v. Humphreys*(3). Here the position is exactly the same as in the above last-mentioned case: see also *Cleland v. Cleland*(4), *Coots v. Whittington*(5), and *In re Lovett*(6), referred to.

By taking possession of the estate Ratan Koer made herself personally responsible, but that does not make her represent the estate.

(1) (1894) J. L. R. 22. Calc. 519.

(2) (1822) 5 Barn. & Ald. 744.

(3) (1734) 3 P. Wms. 348.

(4) (1696) Fin. Pre. Ch. 63.

(5) (1878) L.R. 16 Eq. 534.

(6) (1876) 3 Ch. D. 198.

The difference between the position of an executor *de son tort* and a legal representative is very great: see *Ruckley v. Barber*(1).

Between the 31st March 1900 and the 26th May 1901 there were no proceedings against any one representing the estate; therefore the account must have abated and must be gone into.

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Dr. Rash Behary Ghose (*Babu Charu Chunder Ghose, Babu Tarak Chunder Chuckerbutty* and *M. Mahomed Mustaffa Khan* with him) for the respondent. It is now too late for the other side to suggest that the estate of *Ran Bahadur* was not represented by *Ratan Koer*. Under the Civil Procedure Code it is not necessary that the representatives of the judgment-debtor should be placed on the record: *Hirachand Harjivandas v. Kasturehand Kasidas*(2).

The respondent took all precautions to see that the estate was represented and the Subordinate Judge of Gaya found that there was no will. *Mungniram Marwari v. Gursahai Nand*(3). A Hindu is not bound to take out Letters of Administration, and it has been held in the case of *Prosunno Chunder Bhattacharjee v. Kristo Chytunno Pal*(4) that a person taking possession of the property of a deceased Hindu must be treated as his representative until some other claimant comes forward.

With reference to the question of executor or no executor, see *In the goods of Radhika Mohan Sett*(5). The Probate and Administration Act does not tell us who should be an executor according to the tenor: *Janaki v. Dhanu Lall* (6). The law in regard to an executor *de son tort* in India is laid down in *Henderson's Law of Succession* page 29. The objection as to limitation was raised by the executrix of *Ratan Koer*, and as to this point, see *Balkishen Das v. Bedmati Koer*(7), *Adhar Chandra Dass v. Lall Mohun Das*(8), *Samia Pillai v. Chookalinga Chettiar*(9), and *Malkarjun Bin Shidramappa Pasare v. Narhari Bm Shivappa*(10).

(1) (1851) 6 Ex. 164, 183.

(2) (1893) I. L. R. 18 Bom. 224.

(3) (1889) I. L. R. 17 Calc. 347.

(4) (1878) I. L. R. 4 Calc. 342.

(5) (1871) 7 B. L. R. 563.

(6) (1891) I. L. R. 14 Mad. 454.

(7) (1893) I. L. R. 20 Calc. 383.

(8) (1897) I. L. R. 24 Calc. 773.

(9) (1893) I. L. R. 17 Mad. 76.

(10) (1900) L. R. 27 L. A. 216.

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There is no ground for saying that the execution proceedings are barred by limitation, and I submit therefore that this appeal should be dismissed.

Mr. Hill in reply.

Cur. adv. vult.

June, 25.

GROSE AND PRATT JJ. This is an appeal by one Babu Chuni Lal Bose, Administrator to the estate of the late Raja Ran Bahadur Singh, against an order of the Subordinate Judge of Gaya, disallowing the petition of objection preferred by the said administrator to the execution of a decree passed in favour of one Rai Narain Das against Rani Asmed Koer and Raja Ran Bahadur Singh. The facts out of which the contest between the parties arises are shortly these: Rani Asmed Koer, widow of the late Raja Modh Narain Singh, executed a mortgage bond in favour of the said Rai Narain Das. The latter brought a suit to enforce his mortgage security against Rani Asmed Koer. Raja Ran Bahadur Singh who was then the reversionary heir, was brought on the record as a defendant, and a compromise was come to between the plaintiff and Raja Ran Bahadur Singh, upon which the decree of the 29th March 1873, was passed. Subsequently, on the 18th December 1899, proceedings for the execution of the said decree were taken out against Raja Ran Bahadur Singh, and in the course of this execution, an account was prepared showing the amount due to the decree-holder. Ran Bahadur, however, objected to the said account; but while the matter was still pending before the Court, he died on the 31st March 1890, and this fact having been brought to the notice of the Court, an order was made on the 7th April 1890, upon the decree-holder, to take necessary steps against the legal heirs of the deceased judgment-debtor. It would appear that two persons, Raj Kumari Ratan Koer, who claimed under a will of Raja Ran Bahadur Singh, and one Chotey Narain Singh, who was apparently regarded as the nearest agnate relation and heir *ab intestato* of the said Raja, were made parties to the proceedings. Notices were issued, and though the said notices were served upon them, they did not enter appearance, the result being that the account prepared by the Office of the Subordinate Judge was approved

and confirmed on the 7th May 1890. The decree-holder was then called upon to take further steps, but no such steps having been taken within the proper time, the application was dismissed for default of prosecution on the 15th July 1890. However that may be, the main question that we have been called upon to determine is whether the said order of the 7th May 1890 is conclusive between the parties.

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With a view to determine this question, it is necessary to state that Raja Ran Bahadur Singh, by his will, bequeathed all his property to Raj Kumari Ratan Koer (she being his grand-daughter, born of a son who had predeceased him), with the exception of ten villages which were given to Musammat Rameswar Koer, *alias* Dulhin Sahiba, the widow of that son. Ratan Koer, applied for letters of administration with the will annexed; but this application was opposed by Chotey Narain Singh, and two other persons, Karowr Patti Narain Singh and another, the former claiming (as we gather from the judgment of the District Judge dated the 16th February 1891, which came up to this Court on appeal) as the nearest agnate of Raja Ran Bahadur Singh, being, as stated, his grandfather's great great-grandson, and the two latter, as his grandfather's brother's great-grandsons upon the ground that the will was untrue. The District Judge refused the application upon the ground that the will was not proved, but this judgment was reversed in appeal by the High Court on the 1st September 1891; and the order of the High Court was affirmed in appeal by the Privy Council on the 8th December 1894. Ratan Koer, however, died before taking out letters of administration and she left a will demising her estate to her daughter Raj Kumari Bhubaneswari Koer *alias* Bacha Sahiba, and appointing her mother, Rameswar Koer, and her husband, Rajeswari Prosad Narain Singh, as executrix and executor, respectively.

In the meantime, on the 21st September 1890, the decree-holder presented his second application for execution, the previous application of the 18th December 1889 having been, as already stated, dismissed for default on the 15th July 1900. This application, as we gather, was made against Raj Kumari Ratan Koer and Chotey Narain Singh; and upon this application the mortgaged property was advertized for sale. Ratan Koer seems to have

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objected to the execution on the ground that the dispute in regard to the will left by Raja Ran Bahadur Singh had not been then finally decided, and that the sale ought not to take place until such decision. The execution case, however, was struck off on the 1st August 1891.

A third execution was taken out on the 19th August 1893, and it was taken out against the same persons, Ratan Koer and Chotey Narain Singh, as the legal representatives of Raja Ran Bahadur Singh, the former being described to be in possession of the estate of the said Raja Ran Bahadur Singh. In the course of this execution Ratan Koer pleaded, among other matters, that the account which had been prepared in the course of the execution in 1890 was wrong, and not binding upon her, it having been approved of in her absence, and at a time when the right of succession of the several claimants to the estate of the late Raja had not been adjudicated, and when no letters of administration had been granted. She, however, stated, that, by reason of the will of Raja Ran Bahadur Singh, she was in possession of the estate, save and except ten villages which had been bequeathed to Rameswar Koer. The Subordinate Judge dealt with the question thus raised by Ratan Koer and, by his judgment of the 9th July 1894, held that the substituted judgment debtors having been made parties to the previous execution case of 1891, and the account having been adopted by the Court on the 7th May 1890 after service of notices upon them, and Raj Kumari Ratan Koer having preferred no appeal against that order, she was not competent to question the correctness of the said account. He also held that the decree was not barred by the law of limitation as was contended for by the judgment-debtor.

An appeal was preferred against this order by Ratan Koer to the High Court; but pending this appeal, Ratan Koer died on the 21st May 1895. Thereupon, on an application being made by Rameswar Koer and Rajeswari Prosad Narain Singh, the executrix and executors appointed by the will of Ratan Koer, they were substituted in her place as appellants, but subsequently, upon an objection being raised by the decree-holder, respondent, it was held by a Division Bench of this Court on the 2nd January 1896 that Rameswar Koer and Rajeswari Prosad Narain Singh did not

represent the estate of Raja Ran Bahadur Singh, and that therefore, they had no right to continue the appeal preferred by Ratan Koer and that the appeal must abate. Accordingly the appeal did abate. Subsequently the present application for execution was presented on the 25th April 1896, and it was against Musammat Rameswar Koer and Rajeswari Prosad Narain Singh as executors of Musammat Bhubaneswari Koer, *alias* Bacha Saheba, minor. This application was, however, understood to be an application against the minor Bhubaneswari Koer as well, and it was opposed by those two individuals upon the ground that they were not the executors of Rajkumari Bhubaneswari Koer, and that, therefore, the execution could not proceed against them when Bhubaneswari Koer had not been properly represented. On the 2nd January 1897, the Subordinate Judge disallowed the objection; and against this order an appeal was preferred to the High Court by Musammat Bhubaneswari Koer through her guardian and next friend Musammat Rameswar Koer, but no such appeal was preferred by Rameswar Koer and Rajeswari Prosad Narain Singh in their individual capacity, and it was held that Bhubaneswari being only a legatee of the executrix of the original judgment-debtor, she could not represent the estate of Raja Ran Bahadur Singh, and further that she had not been properly represented in the appeal; the result being that appeal was decreed, and the order of the Court below was set aside, but only in so far as it affected the appellant before this Court, namely, Musammat Bhubaneswari Koer. In the meantime Rajeswari Prosad Narain Singh died, and it would appear that subsequently an application for execution was presented against Rameswar Koer only, and this was opposed by her on the 8th June 1898 upon the ground that she being only an executrix to the will of Raj Kumari Ratan Koer, could not represent the estate of Raja Ran Bahadur Singh, and that the beneficial owner of the properties sought to be sold in execution was Raj Kumari Bhubaneswari Koer under the will of her mother, Raj Kumari Ratan Koer, and that, therefore, the properties could not be sold. On the 20th June 1898 the Subordinate Judge disallowed the objection of the Rameswar Koer upon the ground that the order of his predecessor of the 2nd January 1897, disallowing the objection of Rameswar Koer, was binding

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upon him, and conclusive between the parties. This order was appealed against to the High Court; and a Divisional Bench dismissed the appeal upon the ground as that that portion of the order of the Subordinate Judge of the 2nd January 1897, which directed execution to proceed against the executors under the will of Ratan Koer as representing the estate of Ran Bahadur Singh, had not been interfered with in appeal by the order of this Court of the 31st August 1897, the said order of the 2nd January 1897 was binding upon the appellant.

The original decree-holder, we might here mention, is dead, and the decree has now passed by transfer by his heirs to one Dakshina Mohun Roy. But before this transfer was effected, an application was made by the original decree-holder's heirs, under section 38 of the Probate and Administration Act, for administration of the estate of Raja Ran Bahadur Singh, limited for the purpose of representing the deceased in the execution suit and an order to that effect was made on the 11th November 1899, and it would appear that, on the 16th March 1901, administration was issued to the present appellant, Babu Chuni Lal Bose, and he has been duly substituted in place of the judgment-debtor, so that whatever defects there might have existed in the matter of the execution proceedings that were taken out on different occasions by the decree-holder against the persons described as representing the estate of Raja Ran Bahadur Singh, have now been removed, and we have before us a person who, for the purposes of the execution case, fully represents the estate of the said Raja Ran Bahadur Singh. It should also be mentioned that the name of the present holder of the decree, Dakshina Mohan Roy, was duly substituted in the place of the original decree-holder, but, in connection with a litigation now pending in the Original Side of the High Court, Mr. Beeby has been appointed administrator *pendente lite* to the estate of Dakshina Mohun Roy, and he now represents the decree-holder, who is the respondent before us.

Having stated the facts which bear upon this appeal, we now revert to the order of the 7th May 1890; and the main question, as already indicated, which arises in this appeal is whether that order accepting the account which was then prepared, is conclusive

between the parties. The question also arises whether the order of the 9th July 1894 disallowing the objection of Ratan Koer, and holding her to be bound by the said order of the 7th May 1900, is also conclusive between the parties. The Subordinate Judge has decided both these questions against the judgment-debtor. A further question seems to have been raised in the Court below by the judgment-debtor or rather by the administrator that the execution of the decree was barred by the law of limitation, but we need not deal with that question, it not having been raised before us by the learned counsel on behalf of the appellant.

The Subordinate Judge, however, at the same time has expressed the opinion that if the question of the conclusiveness of the order of the 7th May 1890 and that of the 9th July 1894 were open to him for consideration, he would hold that there was a mistake in the account previously prepared in the sum of Rs. 21,280, and that the judgment-debtor was entitled to credit in respect of that amount.

The learned counsel for the appellant has contended that Ratan Koer was only a residuary legatee under the will executed by Raja Ran Bahadur Singh, and that though she obtained an order for the grant of letters of administration, yet none was taken out by her, and that therefore she could not represent the estate of Raja Ran Bahadur at the time when the order of the 7th May 1890 and 9th July 1894, respectively, were passed, and that it is open to the true legal representative to Raja Ran Bahadur Singh to show notwithstanding those orders, that the account upon the footing of which execution has been taken out is wrong.

Section 4 of the Probate and Administration Act provides that the executor or the administrator, as the case may be, is the legal representative of a deceased person, and all the property of the deceased vests in him. Section 12 ordains that probate of a will, when granted, establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as such. Section 14 says that Letters of Administration entitles the administrator to all rights belonging to the intestate as effectually as if the administrator had been granted at the moment after his death, and section 15 lays down that letters of administration do

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not render valid any intermediate acts of the administrator tending to the diminution or damage of the intestate's estate.

These two latter sections, however, do not apply to this case; for this was no case of intestacy, as regards the estate of Ran Bahadur Singh. Section 19 provides, among other matters, that when a deceased has made a will, but has not appointed an executor, an universal or residuary legatee may be admitted to prove the will, and letters of administration with the will annexed, may be granted to him. And we may take it that Ratan Koer was regarded as filling the character of a residuary legatee, and administration was ordered to be granted to her, though she did not actually take out the letters.

It will be observed that section 190 of the Indian Succession Act, which provides that no right to any part of the property of a person who has died intestate can be established in any Court of Justice unless letters of administration have been granted, has been omitted from the Probate and Administration Act; but section 187 of the Act, though it has not been incorporated in the Probate and Administration Act, has been retained in the Hindu Will's Act. That section provides that no right as executor or legatee can be established in any Court of Justice unless a court of competent jurisdiction within the province shall have granted probate of the will under which the right is claimed, or shall have granted letters of administration under the one-hundred and eightieth section, so that we may take it that an executor or an administrator cannot establish his right under the will until probate or administration has been granted. But the question here is not whether the right of Ratan Koer under the will could be established without a probate or administration, but whether proceedings in execution could be taken against her as the representative of Ran Bahadur Singh.

Under section 82 of the Probate and Administration Act, after any grant of probate or letters of administration, no other than the person, to whom the same shall have been granted, shall have power to sue or prosecute any suit, or otherwise act as representative of the deceased, until such probate or letters of administration shall have been recalled or revoked. If in this case probate or letters of administration had been granted to

anybody, he would be the legal representative of the deceased Raja Ran Bahadur Singh, and the decree-holder would have been bound, having regard to the provisions of section 234, Code of Civil Procedure, to bring such legal representative upon the record of the execution case of the year 1890) when Raja Ran Bahadur Singh died. But though the Raja left a will under which Ratan Koer was the residuary legatee and an application for probate or letters of administration seems to have been made almost immediately after (*i.e.* 7th April 1890) as we gather from the judgment of the District Judge dated the 16th February 1891 to which we have already referred, it was not until the 1st September 1891 that the High Court ordered letters of administration to be granted. Ratan Koer, however, was in the meantime in possession of the estate left by the Raja. In this circumstance, the question arises, who represented the deceased at the time when, after the death of the Raja, the decree-holder was called upon by the Court to take the necessary steps against the legal heirs of the deceased judgment-debtor. It could not be rightly said that because no probate of the will or letters of administration had been granted to any person nobody represented the deceased at the time. And here we cannot do better than refer to the observations of Markby J. in the case of *Frosunno Chunder Bhattacharjee v. Kristo Chytunno Pal*(1). "The executor does not represent the deceased by virtue of the will until he has obtained probate. Who then represents the deceased who has left a will from his death until probate has been obtained? Surely some one must do so, or the law would not have provided that the statute of limitation should run between the death and the grant of probate, and it undoubtedly does," and later on he observed: "Upon the whole I think that until some other claimant comes forward the party who takes possession of the estate of a deceased Hindu must in the present state of the law be treated for some purposes as his representative and that a judgment obtained against such a representative is not a mere nullity. Even if it cannot be executed against the estate in the hands of the executor when he has taken out probate, it is at any rate sufficient to enable the plaintiff to bring a suit against the executor in order to

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have the decree satisfied." This view was accepted by the Madras High Court in the case of *Janaki v. Dhanu Lall*(1), where the learned Judges observed as follows:—"If therefore the creditor is precluded from bringing in any one as the personal representative of the deceased until some one had proved his will, his just claims would be liable to be defeated by the simple expedient of refusing to apply for probate until the debt had become barred. This certainly cannot have been the intention of the law. It appears to us that, though the executor can establish no right without taking probate, the existence of the will cannot be ignored for all purposes whatsoever." And it was held that the persons who took possession of the estate of the deceased upon his death were liable to be treated by the creditor as his representative, even though they themselves were liable to be dispossessed by the executors on taking out probate. The question in these two cases no doubt arose with reference to the suit brought by the creditor against the representative of the deceased debtor, and the effect of the judgment passed in such suit, and not with reference to proceedings taken in execution of a decree against a person as the legal representative of the deceased judgment-debtor; but the principle underlying the observations which we have quoted are equally applicable here. We find however that the Madras High Court, in the case of *Chathakelan v. Govinda Karumizur*(2) has held that the words "legal representative," as occurring in section 234 of the Code, do not necessarily include a person in possession who does not in law represent the estate of the deceased; and that a stranger in possession of the property of the deceased person, who was not a party to the decree ought not to be proceeded against in execution or otherwise, than by a regular suit. But would it be right to regard Ratan Koer as a stranger in possession? There was a will in her favour, and she asked for letters of administration with the will annexed, and this will was ultimately proved to be true; and, apparently, it was on the basis of the right conferred by the will that she entered into possession. Her possession could not, we think, be regarded as the possession of an executor *de son tort*, as Mr. Hill compared her with, so that her acts would not be binding upon the true legal representative, but she was

(1) (1891) I. L. R. 14 Mad. 454. (2) (1898) I. L. R. 17 Mad. 136.

a person who was the residuary legatee, and who was entitled to administer the estate upon letters of administration being received. But apart from this consideration, there was Chotey Narain Singh, and he was throughout the execution proceedings regarded as the legal heir of the deceased *ab intestato*. If Ratan Koer could not represent the estate at the time surely Chotey Narain Singh, or the two other persons, who opposed the application of Ratan Koer for probate of the will did. But nothing seems to have been suggested in the Court below, nor has it been suggested before us that there was any other legal heir *ab intestato* of the deceased Ran Bahadur Singh than Chotey Narain Singh. In these circumstances it seems to us that the substitution of Ratan Koer and Chotey Narain Singh as the legal representative of the deceased judgment-debtor was a good and legal proceeding, and it follows that the order made by the Court on the 7th May 1890, confirming the account prepared by the office was a perfectly legal order, and so it was held by the Subordinate Judge, on the 9th July 1894, when it was determined that Ratan Koer and Chotey Narain Singh were made parties to the execution proceedings, that after service of notices upon them the accounts were adjusted and confirmed, and that the question of the correctness of the account could no longer be questioned. This order, as we have already noticed, also became final by reason of the appeal that was preferred by Ratan Koer having abated in consequence of her death, the legal representative of Raja Ran Bahadur Singh's estate, having not been substituted in her place.

Upon these considerations, we think that the view adopted by the Court below is right, and that the question of the correctness of the account, that was prepared and adopted in the year 1890, is no longer open for consideration. The result is that this appeal is dismissed with costs.

Appeal dismissed.

R. G. M.

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July 30.

SHYAM SUNDAR LAL

v.

BAJPAI JAINARAYAN.*

*Execution of Decree—Security bond—Mortgage—Sale of mortgaged property—
Civil Procedure Code (Act XIV of 1882) s. 545. Transfer of Property
Act (IV of 1882) s. 67 and s. 99.*

The relationship between a decree-holder, and a judgment-debtor who has executed a security bond under s. 545, cl. (c) of the Civil Procedure Code, mortgaging certain properties, for the due performance of the decree or order that may ultimately be passed by the appellate court, is not that of mortgagee and mortgagor; and in the event of the appeal being dismissed the decree-holder is entitled to realize his decretal money by sale of the properties given in security without instituting a suit under s. 67 of the Transfer of Property Act.

APPEAL by the plaintiff, Shyam Sundar Lal, the decree-holder.

The plaintiff, decree-holder, obtained a money decree on a bond and applied for execution of the decree while an appeal against the decree was pending; thereupon an application was made by the defendant judgment-debtors for the stay of execution under s. 545 of the Code of Civil Procedure. The application was granted upon the defendant giving security for the due performance of any decree that might ultimately be passed. A security bond was executed by the judgment-debtors by which they mortgaged certain properties as security. The appeal was eventually dismissed. Thereupon the decree-holder applied for realization of the money due under his decree by sale of the properties mortgaged by the security bond of the judgment-debtors. The security-bond which was not addressed to the decree holder or any body in particular was in the following terms:—

“ We execute this security bond for Rs. 10,000 by mortgaging property and we declare as follows:—

1. We mortgage in this security bond for Rs. 10,000, the property mentioned at the foot of this security bond, the estimated value of which exceeds Rs. 40,000 and which is free from any lien whatever.

2. That before the disposal of the appeal which we were to file in the Allahabad High Court at the time when the order for furnishing security was passed and which we have now filed, the decree-holder shall have no right to take out execution

* Appeal from Original Order No. 391 of 1902 against the decree of Kartick Chandra Pal, Subordinate Judge of Shahabad, dated July 24, 1902.

of the decree, and in the event of the appeal being decided against us, which, God forbid, the decree-holder shall have right to realize up to Rs. 10,000 on account of the decretal money, as will be found due to him by account from the property mentioned in this security bond and to his doing so we and our heirs and representatives neither have nor shall have any objection whatever. Therefore this security bond containing the conditions mentioned above is given in writing for Rs. 10,000 so that it may be of use when required."

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The Subordinate Judge disallowed the application for sale on the ground that the properties could not be sold without obtaining a decree under s. 67 of the Transfer of Property Act.

Babu Raghu Nandan Prosad for the appellant. The decree-holder is not a mortgagee within the meaning of s. 99 of the Transfer of Property Act. The security bond is not addressed to him or any one in particular, it was given for the satisfaction of the Court; cl. (c) of s. 545 of the Civil Procedure Code makes it clear.

Babu Lakshmi Narain Singh for the respondent. The decree-holder seeks the benefit of the mortgage created by the security bond and he cannot proceed to sell the properties without instituting a suit under s. 67 of the Transfer of Property Act; s. 99 of the Act is a bar to the remedy asked for by the decree-holder: *Chundra Nath Dey v. Burroda Shoonduary Ghose*(1) and *Aubhoyesury Dabee v. Gouri Sunkur Panday*(2).

GHOSH AND PARGITER JJ. This is an appeal by the decree-holder. The facts out of which this appeal arises are shortly these:—

The plaintiff decree-holder obtained a money-decree in the Court of first instance, but before the time for appeal against the said decree had expired, he applied for execution of the decree. Thereupon, an application was made by the defendant judgment-debtor for the stay of execution under section 545 of the Code of Civil Procedure. The Court of first instance granted the application upon the defendant giving security in the amount of Rs. 10,000. In accordance with the order of the Court, the security bond was executed by the defendant, by which certain properties were mortgaged as security for the due

(1) (1895) I. L. R. 22 Cal. 813.

(2) (1895) I. L. R. 22 Cal. 859.

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performance of any decree or order that might ultimately be passed.

It would appear that an appeal was preferred by the defendant against the decree of the Court of first instance, but that appeal was dismissed. Thereupon the decree-holder applied for realization of the money covered by his decree, by sale of the properties comprised in the security bond, executed by the defendant judgment-debtor. The Court below has disallowed the application upon the ground that under section 99, read with section 67 of the Transfer of Property Act, the decree-holder could not bring to sale the properties in question before obtaining a decree under the provisions of the last-mentioned section of the Transfer of Property Act. Hence this appeal by the decree-holder.

Section 99 of the Transfer of Property Act runs as follows:—
 “Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section 43.

The question that arises before us for consideration is whether the decree-holder is a “mortgagee” within the meaning of the section. If he be such a mortgagee, no doubt, he cannot sell the properties comprised in the mortgage without obtaining in the first instance, a decree under the provisions of section 67 of the Transfer of Property Act. But if otherwise, there is no bar to the decree-holder obtaining the remedy he has asked for. Now looking at the security bond in question, it will be observed that it is not addressed to the decree-holder nor to anybody in particular; but it is in reality in favour of the Court. And this seems to be clear if we read the document by the light of clause (c) of section 545 of the Code of Civil Procedure. That clause is as follows:—“That security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him,” that is to say, the judgment-debtor.

It was for the due performance of the decree or order that might ultimately be passed by the Appellate Court that the security

was given and in this view of the matter, the decree-holder could not be regarded as a mortgagee in the strict sense of the term, though no doubt in the event of the appeal being dismissed, he would be entitled to realize his decretal money by sale of the properties given in security. For these reasons we are unable to hold that the decree-holder is a mortgagee within the meaning of section 99 of the Transfer of Property Act. It follows therefore that there is no bar to the decree-holder suing for the remedy he has asked for, in execution of his decree.

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JAINARAYAN.

The result is that the order of the Court below is set aside with costs, and the case sent back to that Court, so that the execution asked for may be granted.

Appeal allowed; case remanded.

S. C. B.

BOIDYA NATH PANDAY

v.

GHISU MANDAL.*

1902
Feb. 10.

Notice—Bengal Tenancy Act (VIII of 1885) s. 155.—Ejectment, Suit for—Alternative relief—Limitation.

A suit for the ejectment of a tenant for misuse of the land, was dismissed by the Court below on the ground that the notice served on the tenant under s. 155 of the Bengal Tenancy Act was bad, as the compensation claimed in the notice for the misuse was demanded in the alternative:—

Held, that the notice was not bad in law merely because the compensation was demanded in the alternative.

Pershad Singh v. Ram Pertab Roy (1) distinguished.

SECOND APPEAL by the plaintiffs Boidya Nath Panday and others.

This appeal arose out of an action brought by the plaintiffs to eject the defendant, after notice under section 155 of the Bengal Tenancy Act. The allegation of the plaintiffs was that they

* Appeal from Appellate Decree No. 198 of 1900, against the decree of W. Teunon, District Judge of Moorshedabad, dated Nov. 6, 1899, affirming the decree of Purna Chandra Banerjee, Munsif of Lalbagh dated March 15, 1899.

(1) (1894) I. L. R. 22 Calc. 77.

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were the *darputnidars* of mouzah Chainpore; that the defendant was holding the land in suit, for agricultural purposes in the said mouzah under a settlement taken from the putnidar on the 23rd Joisto 1303 (4th June 1896); that the defendant had no right other than that of holding and cultivating the land; but that he had dug out earth from a portion of the land rendering it unfit for cultivation for which purpose only he took the settlement; that under the terms of the settlement, the defendant, by reason of the excavation, made himself liable to ejectment; that the plaintiffs served upon the defendant a notice, under section 155 of the Bengal Tenancy Act, requiring him on pain of ejectment to fill up the excavation within a certain time or in the alternative to pay to the plaintiffs the sum of Rs. 320 as compensation for the injury done to them; and that the defendant did not comply with the requirements of the notice and hence the suit.

The defence (for the purposes of this report) mainly was, that the notice was not in accordance with law.

The Court of First Instance decreed the plaintiff's suit in part, allowing Rs. 40 only as compensation. The plaintiffs appealed, and the defendant filed a cross-appeal. The District Judge of Murshidabad dismissed the plaintiff's appeal, but decreed the cross-appeal, holding that the notice did not strictly comply with the requirements of section 155 of the Bengal Tenancy Act, inasmuch as it did not require the tenant to remedy the misuse of the land and also to pay a sum as reasonable compensation.

Dr. Ashutosh Mukerjee, Babu Jnanendra Nath Bose and Babu Hemendra Nath Sen, for the appellants.

Babu Saroda Charan Mitra and Babu Karuna Sindhu Mukerjee for the respondent.

RAMPINI AND PRATT JJ. The defendant occupies a bigha of land under the plaintiffs. The land was let to him for purposes of cultivation. He has made a large excavation in the land, which rendered it unfit for the purpose for which it was demised to him. The plaintiffs therefore served on him a notice calling on

him to fill up the excavation or to pay them Rs. 320 damages or failing to do either to quit the land. The defendant did not comply with the terms of the notice and so the plaintiffs have brought this suit to eject him from the land. The District Judge has dismissed the suit, on the ground that the notice was bad, as the damages claimed in the notice were claimed in the alternative, whereas in his view the plaintiff should have claimed damages in addition to the compensation demanded in lieu of filling up the excavation.

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The plaintiffs appeal. We are of opinion that the view taken by the Judge is not warranted by the terms of section 155. That section requires that the notice should call upon the tenant to remedy the misuse complained of, and should further call upon him to pay compensation for the misuse. The notice served on the defendant complied with these provisions. It no doubt claimed the compensation in the alternative. This does not, we think, render the notice bad. That the claim for damages was in the alternative was in favour of the tenant. We think there is no ground or reason for the view of the District Judge that the notice must call upon the tenant not only to pay compensation to the landlord for the misuse complained of, but also some additional compensation over and above the amount required to remedy the misuse of the land of which the tenant has been guilty.

We have been referred to the case of *Pershad Singh v. Ram Pertab Roy* (1) in which it was held that a notice in which no compensation was claimed was bad, and that in every case such compensation must be demanded.

In that case no compensation at all was claimed in the notice. In the notice in this case the defendant was called upon to pay compensation if he did not choose to remedy his misuse of the land. Hence, the ruling cited does not apply. As we have already said, we do not think the notice was bad merely because the compensation was demanded in the alternative.

The respondent's pleader argues that the suit is barred by limitation because the lease of the defendant contains a clause apparently providing that he shall quit the land if he changes

(1) (1894) I. L. R. 22 Calc. 77.

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its condition. It has been contended that this clause only precludes the tenant from altering the class (*bira*) of the land. But in any case we think the period of limitation is two years, because the plaintiffs sued to eject the tenant for misusing the land and not for breaking a condition of the lease. Even if the landlord binds the tenant down not to alter the condition of the land, this does not reduce the period of limitation allowed him by the law from two years to one, when the tenant misuses the land and renders it unfit for the purpose for which it was demised.

We accordingly decree the appeal with costs in proportion. The decree of the munsif is restored, save as to costs.

The defendant will have two months' time from this date to fill up the hole, or pay Rs. 40 damages. The record will be sent down to the first Court at once.

S. C. G.

Appeal allowed.

1908
 July 8.

BHARAT PROSAD SAHI

v.

RAMESHWAR KOER.*

*Set-off—Decretal amount as set-off—Civil Procedure Code (Act XIV of 1902)
 s. 111, Ill. (d).*

In a suit for recovery of arrears of rent the defendant's claim to set-off the amount of a decree obtained by him against the plaintiff was disallowed by the Court below on the ground that the decree had not been attempted to be enforced:—

Held, that the Lower Court was wrong in not entertaining the claim of set-off raised by the defendant; Ill. (d) of s. 111 of the Civil Procedure Code makes it perfectly clear that the Court can entertain such a claim.

APPEAL by the defendant, Bharat Prosad Sahi.

The plaintiffs instituted this suit for the recovery of the sum of Rs. 5,303-5-11 due for arrears of rent together with damages for the years 1304 to 1307 Fusli, in respect of a mokurari

* Appeal from Original Decree No. 241 of 1901, against the decree of Proesanna Chandra Roy, Subordinate Judge of Gaya, dated July 5, 1901.

tenure held under them by the defendant. In the written statement the defendant alleged that the plaintiffs had in 1894 instituted two suits for arrears of rent against him which were decreed in favour of the plaintiffs by the Court of First Instance, but on appeal the High Court reversed the said decrees and awarded the defendant costs in both the suits; the judgment of the High Court was affirmed by the Privy Council and the costs of the appeal amounting to Rs. 6,125 was by the decree of the Privy Council dated the 17th June 1899 awarded to be paid by the plaintiffs to the defendant. A further sum of Rs. 170 was due to the defendant from the plaintiffs under an order of the High Court, being the costs of enquiry as to security in the appeal to the Privy Council. The defendant claimed to set-off against the plaintiffs' demand, these two sums as well as a sum of Rs. 500 for alleged damages suffered by the defendant on account of the plaintiffs having taken wrongful possession of a certain property and another sum of Rs. 107-14-9 alleged to have been paid by the defendant on account of a certain *sarpeshgi* lease and a further sum of Rs. 152-7-0 alleged to have been paid by the defendant to a former lessee of the plaintiff on account of mouzah Ghatara Babubigha.

The Subordinate Judge of Gaya declined to entertain the plea of set-off raised by the defendant and decreed the plaintiff's claim in full with the following observations:—

"I think this Court, having no power to enter full satisfaction on the Privy Council decree, cannot set-off the amount due on it to a claim made in this suit. That is not the object of section 111 of the Civil Procedure Code. This Court has no power to execute that decree. The defendant also asks to set-off the amount due on a High Court decree but a copy of that decree has not been filed. It is said that the plaintiff agreed to set off the amount. But her witness says that one of her servants said so. But it is not shewn whether that servant had authority to do so.

The evidence of the defendant's witness shews that the amount of *wasilat*, if due, is not ascertained. Therefore section 111 does not apply.

The defendant's witness has not given the amount of the *sarpeshgi* if there be one."

Mr. R. Mitra and *Babu Jogendra Chandra Ghose* for the appellant.

Babu Umkali Mukerji, *Babu Saligram Singh* and *Babu Lakshmi Narain Singh* for the respondent.

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GHOSE AND PRATT JJ. This appeal arises out of a suit for rent in respect of the years 1304 to 1307 F. S. due on a mokurari tenure held by the defendant under the plaintiffs. The latter sought to recover the sum of Rs. 4,242-11-2 as due with damages in the amount of Rs. 1,060-10-9, in all Rs. 5,303-5-11. The defendant pleaded that he was entitled to set-off against the plaintiff's claim certain sums of money due to him, and that far from there being anything due to the plaintiffs, a considerable amount was payable by the plaintiffs to him. The sums in respect of which set-off was claimed were *first*, Rs. 6,125 recoverable under a decree passed by the Privy Council on the 17th of June 1899 between the very same parties; *secondly* the sum of Rs. 170, being the costs of inquiry as to security in the appeal to the Privy Council under the orders of the High Court; *thirdly*, a certain amount due to the defendant as damage on account of the plaintiffs having taken possession of a certain property when they were not so entitled; *fourthly* the sum of Rs. 107-14-9 on account of certain *zarpeshgi* which the defendant had paid; and *lastly* the sum of Rs. 15-2-7 on account of mouzah Ghatara Babubigha, which the defendant had paid to the former lessee of the plaintiff.

The Subordinate Judge has declined to entertain the plea of set-off thus raised and has decreed the plaintiff's claim in full. With respect to the amount of costs recoverable under the decree of the Privy Council, to which we have already referred, the Subordinate Judge makes the following observations:—"I think this Court having no power to enter full satisfaction on the Privy Council decree, cannot set-off the amount due on it to a claim made in this suit. This is not the object of section 111 of the Civil Procedure Code. This Court has no power to execute that decree." We do not quite understand what the Subordinate Judge here means. He was perhaps under the impression that the matter fell under section 246 of the Code of Civil Procedure, and that because the decree of the Privy Council was not under execution in his Court, he could not entertain the plea of set-off raised by the defendant. In this respect, we think he is clearly in error. Section 111 of the Code provides "If in a suit for the recovery of money the

defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, and if in such claim of the defendant against the plaintiff both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, tender a written statement containing the particulars of the debt sought to be set-off."

"The Court shall thereupon inquire into the same and if it finds that the case fulfils the requirements of the former part of this section, and that the amount claimed to be set-off does not exceed the pecuniary limits of its jurisdiction, the Court shall set-off the one debt against the other." And so on.

There can be no question here that the amount which the defendant claims to set-off so far as the costs awarded by the Privy Council are concerned, is an ascertained sum, which is legally recoverable, and there is also no question that both parties fill the same character in this suit as also in the claim which the defendant sets up. It is obvious therefore that the question of set-off pleaded by the defendant can be entertained under section 111. And this is made perfectly clear by illustration (d) of the same section, which says:—"A sues B on a bill of exchange for Rs. 500. B holds a judgment against A for Rs. 1,000. The two claims, being both definite pecuniary demands, may be set-off."

No doubt, if the decree of the Privy Council had been put into execution in the Court of the Subordinate Judge, he would be bound to deal with the claim of the defendant under section 216 of the Code, provided of course, that the plaintiff had recovered judgment in this suit, and applied for execution of his decree. It does not however follow from this, that the Subordinate Judge cannot entertain the claim of the defendant under section 111 of the Code, when the decree of the Privy Council has not been as we understand, attempted to be enforced by execution.

In this view of the matter, we are of opinion that the Court below was wrong in not entertaining the claim of set-off raised by the defendant so far as it is covered by the decree of the Privy Council.

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As regards however the other claims set up by the defendant, we agree with the Subordinate Judge for the reasons given by him in declining to entertain them under section 111 of the Code.

The result is that the case will be sent back to the Court below, so that the claim of the defendant may be as already stated dealt with under section 111 of the Code. It should however, be understood that if the defendant has applied to the Court of the Subordinate Judge for the execution of the decree of the Privy Council, the matter should not be dealt with under section 111.

There is, however, one other matter that we desire to refer to, and that is as regards the decree for damage or compensation, which has been allowed by the Subordinate Judge. It appears that the decree of the High Court which was affirmed by the Privy Council on the 17th of June 1899 was passed on the 15th May 1894 corresponding to Baisak 1301. Under that decree, a considerable sum of money was due to the defendant as costs, and it further appears that during the years in suit (1304 to 1306) considerable sums of money were paid by the defendant at different times to the plaintiff as rent, such being the case this was not a case in which damages should have been awarded to the plaintiff as the Court below has done. All that the plaintiff is entitled to is the ordinary rate of interest, that it to say at the rate of 12 per cent. per annum from the end of each quarter in which the instalment falls due.

With these observations we send the case back to the Court below so that the claim set up by the defendant and as covered by the decree of the Privy Council might be dealt with under section 111, Code of Civil Procedure, and a proper decree made.

In the circumstances of the case we think that each party should bear his own costs in all the Courts up to the present stage. Subsequent costs will abide the result.

Case remanded.

S. O. B.

AFZUL HOSSEIN

v.

RAJBUNS SAHAI.*

1908

March, 20.

Revenue Sale—Act XI of 1859, ss. 13, 14, 23, 29, 37, 54—Share of estate, sale of—Mokurari lease—Rights of purchaser of share of estate—Merger—Encumbrance.

The sale of a share of an estate for arrears of revenue, under the provisions of Act XI of 1859, does not affect, wholly or in part, a valid *mokurari* lease of lands comprised in the estate, notwithstanding the fact that the lease is held by some of the defaulting proprietors of the share sold, having a fractional proprietary interest therein.

Kasinath Koowar v. Bankubehari Chowdhry(1) and *Madhub Chunder Chowdhry v. Promotho Nath Roy*(2) referred to.

APPEAL by the defendants, Afzul Hossain and others.

Separate accounts having been opened at the instance of some of the proprietors of taluk Turwan, the remaining *ijmali* share remained liable for payment of Government revenue to the amount of Rs. 1,840. This *ijmali* share having fallen into arrears of Government revenue, it was put up to sale by the Collector and purchased by the plaintiff No. 1 on the 25th March 1897, and the said plaintiff was duly put in possession of the same.

The defendants are the heirs and legal representatives of one Syed Mahomed Hossain, who obtained a *mokurari* pottah of the entire taluk Turwan, dated the 3rd November 1838, from one Rani Amirunnissa, the original proprietress of the taluk, whereby an annual profit of Rs. 216 only was reserved in her favour. Subsequently the defendants Nos. 1 and 2 and their brother, who was the predecessor in interest of the other defendants, acquired 5 annas 4 pies of the proprietary interest in some villages comprised in the said taluk. The defendants were thus amongst the proprietors for whose default the *ijmali* share was sold.

* Appeal from original decree No. 887 of 1899, against the decree of H. Holmwood, District Judge of Gaya, dated Nov. 6, 1899.

(1) (1869) 8 B. L. R. (A. C.) 446; 12 W. R. 440. (2) (1873) 20 W. R. 284.

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It appears that the defendants and the other defaulting proprietors instituted a suit to set aside the revenue sale, but that the suit failed. In the course of the said suit, the defendants had set up the *mokurari* lease aforesaid.

The present suit was instituted for a declaration that after the revenue sale dated the 25th March 1897, the defendants had no valid, subsisting *mokurari* lease or other encumbrance within the purview of Act XI of 1859, the cause of action being alleged to have arisen on the 11th January 1898, the date of service of summons on the plaintiff No. 1 in the said suit brought to set aside the revenue sale.

The defendants contended that although the proprietary interest acquired by them in some of the villages comprised in the taluk no doubt passed to the plaintiff No. 1 by the revenue sale, yet the *mokurari* interest in the entire taluk belonging to themselves and their transferees was not at all affected by the sale, being an interest protected within the meaning of the revenue sale law.

The learned District Judge held that the *mokurari* set up by the defendants was legal and valid and that they held possession of the taluk under it on payment of rent. With reference to the question as to the effect of the revenue sale on the *mokurari*, he held that the *mokurari* was extinguished to the extent of 5 annas 4 pie share, but that the rest of it was not affected at all. With regard to the former share, he observed as follows:—

“The only question that remains is, whether the 5 annas 1 dam odd of defendants’ *mokurari*, which they held under themselves, does not cease to exist by operation of law, under the express terms of section 54 of Act XI of 1859. It would appear from that section and from the authorities cited that the purchaser does *ipso facto* acquire any rights possessed by the previous owner or owners. That is to say, he steps into the shoes of the owners. Therefore as regards the 5 annas odd, he gets the *mokurari* to himself and it is extinguished by operation of law. This has nothing to do with the doctrines of merger under the Transfer of Property Act, since the transfer to plaintiff is not the act of parties, but is done by operation of law. He acquires the *mokurari* right in the 5 annas odd, but not being subject to the special exception of fractional interests under section 3 of the Transfer of Property Act, the *mokurari* interest lapses in his case, as he cannot hold a lease under himself nor under the Government which put him in possession, and he is not privy to any of the acts of the previous owners.

"It is argued by the defendants against this, that the Collector only sells the share or shares of an estate, and under the wording of section 18, the revenue sale is confined entirely to the proprietary right. But this would annul section 37 altogether and also the latter part of section 54. Certain penal consequences are attached to the sale of an entire estate by express law, and these are not confined to the mere proprietary right. Negatively, too, certain consequences, though not of a penal nature, are attached to section 54. One of these consequences is the exact co-extension of all the rights held by the former owner in the share sold with the rights of the new purchaser."

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The suit was accordingly partially decreed, it being declared "that out of the entire 16 annas of the *mokurari* of the defendants held in their legal and lawful possession, 5 annas 1 dam and a fraction more share of which they were the proprietors, has been extinguished under the force of law."

Moulvi Mustufa Khan, for the appellants, contended that there could be no merger in the present case, as the proprietary and *mokurari* rights were distinct: see *Womesh Chunder Gooplo v. Raj Narain Roy*(1), *Savi v. Panchanun Roy*(2) and *Jibanti Nath Khan v. Gokool Chunder Chowdhry*(3). Section 3 (d) of the Transfer of Property Act does not apply. See also Saroda Charan Mitra's Land Law of Bengal, Tagore Law Lectures, 1895, pp. 228-231. Besides, the plaintiffs being owners of a fractional share of an estate, are not competent to sue to set aside the *mokurari*: see *Monohur Mookerjee v. Huromohun Mookerjee*(4), *Kusinath Kowar v. Bunkubehari Chowdhry*(5) and *Madhub Chunder Chowdhry v. Promotho Nath Roy*(6). Sections 13, 14, 53 and 54 of Act XI of 1859 show that in such a case only the proprietary right is sold and the encumbrances are unaffected by the sale.

No one appeared for the respondents.

GHOSE AND PRATT JJ. The plaintiff is the purchaser at a sale for arrears of revenue which took place on the 25th March 1897. The sale was not a sale of the entire estate, but only of a share thereof under the provisions of section 13 of the Revenue

(1) (1868) 10 W. R. 15.

(2) (1876) 25 W. R. 503.

(3) (1891) 1 L. R. 19 Calc. 760.

(4) (1864) 1 W. R. 26.

(5) (1869) 3 B. L. R. (A. C.) 446;
12 W. R. 440.

(6) (1873) 20 W. R. 264.

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Sale Law (Act XI of 1859). The defendants, or rather their ancestors, are persons, who, on the 3rd November 1838, had acquired a *mokurari* right over the entire estate from the then proprietor thereof. Recently, however, some of the *mokuraridars* purchased from two of the proprietors of the estate a 5 annas 1 dam share thereof. The present suit was instituted in February 1899 for the purpose of obtaining a declaration that the defendants had no valid subsisting *mokurari* lease in the property, and that, after the auction sale, no right, title or interest in the share purchased by plaintiff remained with the defendants.

The Court below has, however, found that the *mokurari* set up by the defendants was really granted in 1838 by the then owners of the estate. It has further found that, upon the purchase by the defendants, or some of them, of the 5 annas 1 dam share of the proprietary interest, the *mokurari* did not merge into the higher interest, but that having regard to the provisions of section 54 of the Revenue Sale Law, the defendants' *mokurari* must be taken to have come to an end to the extent of the 5 anna 1 dam share which they had in the zemindari. The suit has otherwise been dismissed. Against this declaration by the District Judge the present appeal has been preferred by the defendants.

The case depends entirely upon the construction of section 54 of the Revenue Sale Law. That section runs thus:—"When a share or shares of an estate may be sold under the provisions of section 13 or 14, the purchaser shall acquire the share or shares subject to all encumbrances, and shall not acquire any rights which were not possessed by the previous owner or owners." Now the *mokurari* lease in favour of the defendants, in November 1838, was unquestionably an encumbrance within the meaning of the section, and the plaintiff, having purchased only a share of the estate under the provisions of section 13 of the Act, acquired it subject to this encumbrance. Let us then see how, though the plaintiff has purchased a share of the estate subject to the *mokurari*, can he be entitled to treat the *mokurari* to the extent of 5 annas 1 dam share as having been extinguished, as the Judge has put it, by reason of the sale at which he purchased? It will be observed that the concluding words of section 54 are very significant as bearing upon the question which we have to consider, those words being—

“and shall not acquire any rights which were not possessed by the previous owner or owners.” The section does not say “he shall acquire all the rights which were possessed by the previous owner or owners,” for, in that case no doubt, the position taken by the District Judge would be correct, because the defendants, at any rate some of them, being proprietors to the extent of 5 annas 1 dam share, and being also possessed of the *mokurari* interest in respect of the said 5 annas 1 dam share, it might be said that their rights, that is to say, all the rights they possessed, not only in the 5 anna 1 dam share of the zemindari, but also in the 5 annas 1 dam share in the *mokurari* interest, passed to the plaintiff. But as we have already pointed out, the law does not give to the plaintiff such rights. As bearing upon the construction of section 54, we desire to refer to the provisions of section 14 of the Revenue Sale Law. That section relates, amongst other matters, to a purchase by the shareholders other than the owner of the defaulting share, in the event of the sale of the share in default not fetching the full amount of the arrears due to Government, and it provides as follows :—“The Collector shall declare that the entire estate will be put up to sale for arrears of revenue at a future date, unless the other recorded sharer or sharers, or one or more of them, shall within ten days purchase the share in arrear by paying to Government the whole arrear due from such share. If such purchase be completed, the Collector or other officer as aforesaid shall give such certificate and delivery of possession as are provided for in sections 28 and 29 of this Act, to the purchaser or purchasers who shall have the same rights as if the share had been purchased by him or them at the sale,” that is to say, the owners of the share or shares in the event of their becoming purchasers in the circumstances contemplated shall acquire only the same rights as if the share had been purchased by him or them at the sale. We introduce the word “only” as indicating what the Legislature clearly means, that is to say, that the said purchaser acquires only the same interest which he would have if he had purchased it at the sale.

Reading section 54 by the light of section 14 of the Act, it seems to us that it could not rightly be held that the purchaser of a share at a revenue sale under section 13 acquires all the rights

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which were possessed by the previous owner or owners; and this is the position that has been taken by the District Judge. In this connection we may refer to the case of *Madhub Chunder Chowdhry v. Promotho Nath Roy*(1), the particular passage which we have in view being found at p. 266. That was a case of the sale of an estate in respect of which a separate account had been opened in the Collectorate; and the learned Judges, in delivering judgment, amongst other matters, observed as follows:—"It is, therefore, clear that the plaintiff is not the purchaser of an entire estate. Had he been so, he would have acquired the estate free from all encumbrances and would have been entitled to avoid and annul all under-tenures with the exception of such as are reserved under the provisions of section 37 of Act XI of 1859. The plaintiff being the purchaser of a share in an estate has acquired that share subject to all encumbrances and he has acquired no rights which were not possessed by the previous owners: see section 54 of Act XI of 1859." The question here arises, whether the previous owners of the estate or the owner of the share which the plaintiff has purchased at the revenue sale, had the right to annul the *mokurari* set up by the defendants. It is obvious that they had no such right; and it could not rightly be said that the plaintiff, having purchased that share subject to all the encumbrances which had been created by the previous owners thereof, is entitled to treat the *mokurari* to the extent of a 5 annas 1 dam share, as having been extinguished by the sale in question. A similar view was expressed in the case of *Kasinath Koowar v. Bankubehari Chowdhry*(2), the particular passage we have in view being at p. 450. Upon these grounds we think that the learned Judge has not taken a right view of the respective rights of the parties to the suit. We accordingly order that his decree be varied so as to dismiss the suit with costs.

Appeal allowed.

M. N. R.

(1) (1873) 20 W. R. 264.

(2) (1869) 3 B. L. R. (A. C.) 446; 12 W. R. 440.

BUDHU MANDAL

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July 7, 17.

*Easement—Customary right—Use of water and water course—Riparian rights—
Irrigation—Continuous use—Interruption—Unreasonable rights—Nuisance.*

An easement which is not a customary right need not be reasonable.

An easement may be established of the right to cause river water to flow across the servient tenement on to the dominant tenement for the purpose of irrigation, by means of embankments erected on the dominant tenement. In establishing such easement, it is immaterial whether the exercise of the right is continuous, provided it has been exercised for the statutory period, during seasons of drought, when it could be taken advantage of.

Cooper v. Barber(1), *Whalley v. Lancashire and Yorkshire Railway Company*(2), and *Rylands v. Fletcher*(3) distinguished.

Hollins v. Verney(4) doubted.

SECOND APPEAL by the defendants, Budhu Mandal and others.

Eleven suits were instituted by different raiyats of the village Duria against the defendants for damages done to their paddy crops by the wrongful acts of the defendants. The plaintiffs' case was that they had paddy fields in the said village on the north of the river Soori, which flowed here from west to east through the opening of a railway bridge of 25 spans, and their fields lay on the east and west sides of the railway line; that for the purpose of irrigating their lands, they used to raise a bund across the river at some distance on the west of the said bridge, whereby the water rose and flowed over the fields on the western side of the bridge, whence it was taken to the eastern side through the openings, two small bunds being erected, one on each side of the bridge, to prevent the water from flowing back into the river; that the water so taken from the river used to flow over the railway cuttings on both the sides of the line;

* Appeal from Appellate Decree No. 2167 of 1900 against the decree of C. H. Bompas, Offg. District Judge of Birbhum, dated July 30, 1900, affirming the decree of Bepin Behari De, Munsif of Rampur Hât, dated March 29, 1900.

(1) (1810) 3 Taunt. 99.

(3) (1866) 3 H. L. 330.

(2) (1884) L. R. 13 Q. B. D. 181.

(4) (1884) L. R. 13 Q. B. D. 304.

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and that the defendant No. 1, who had obtained a settlement of the fishery rights in the said railway cuttings, caused the said small bunds to be cut with the help of the other defendants on the 16th September 1895, and thereby prevented the water from coming upon the plaintiffs' lands. It was alleged that by erecting the bunds and using the water of the river in the manner aforesaid for upwards of 20 years, the plaintiffs had acquired a right of easement in respect thereof, and that the defendants, by diverting the water course as aforesaid in infringement of that right, and thereby causing loss of paddy crops to the plaintiffs in the fields on the east of the railway line, had made themselves liable to damages.

The defendants denied the rights alleged by the plaintiffs and contended that they were opposed to law and unreasonable. It was further contended that the plaintiffs used to irrigate their fields by water taken from the river along a different channel; that the defendant No. 1 used to cultivate paddy on the lands on both the sides of the railway line let out to him; and that he had simply prevented the plaintiffs from making preparations to wrongfully erect a bund on the east of the bridge, which would have had the effect of submerging his *abadi* lands and destroying the crops raised thereon.

The Munsif held that the plaintiffs had established their alleged right by proving more than 20 years' user from a date prior to 1280 B. S. down to 1302 B. S., and had thus acquired a right of easement. He found that the defendant No. 1 had interrupted that right in Bhadra 1302 B. S., in the manner alleged in the plaint, with the view of improving the position of his cuttings and thereby making them culturable; and he decreed the suits for damages in a modified form. With reference to the contention of the defendants that as the cuttings were, before the occupation of the defendant No. 1 in 1301 B. S., in possession of one Sukchand Mal for 15 or 16 years, that period could not be taken into account in calculating the period of the plaintiffs' 20 years' user, the Munsif held that the tenancy of the said Sukchand, which included the land as well as the fishery, was a permanent and heritable one, and section 27 of the Limitation Act did not therefore apply.

The defendants appealed to the District Judge who dismissed the appeal.

Mr. Hill (Babu Saroda Prosanna Roy, Babu Tarak Chandra Chakravarti and Babu Nikhil Nath Roy, with him) for the appellants. The right claimed is not strictly an easement; it is a customary right in the inhabitants of the village; it must be reasonable. Besides, if it is at all an easement, it is supported on a customary right, and as that right cannot exist by reason of its being unreasonable, the easement cannot exist. Even as a prescriptive right, it cannot be supported in law; the bund the plaintiffs claim to erect is not on the defendants' land, but they simply claim a prescriptive right to submerge the defendants' lands; in such a case no length of enjoyment gives a prescriptive right: see *Hilton v. Earl Granville*(1), *Rowbotham v. Wilson*(2), *Blackett v. Brudley*(3), *Dyce v. Lady James Hay*(4), *Zumeer Ali v. Doorgabun*(5), *Gooroo Churn Goon v. Gunga Gobind Chatterjee*(6), *Joy Doorga Dossia v. Juggernath Roy*(7), *Sreedhur Dey v. Adoyto Kurmakar*(8), *Doorga Churn Dhur v. Kally Coomar Sen*(9). The last six cases aptly illustrate destructive easements. See also *Rylands v. Fletcher*(10), which is a leading case, *Whalley v. Lancashire and Yorkshire Railway Company*(11), *Cooper v. Barber*(12), a case almost on all-fours with the present: Goddard on Easements, 5th Edn., p. 28; Broom's Legal Maxims, 6th Edn., p. 370; Coleson and Forbes on Waters, 2nd Edn., p. 137; Angel on Water courses, para. 332.

As to twenty years' user, the Munsif finds that out of the 25 years from 1280 B.S. to 1305 B.S., the year of the suit, there was no drought for 12 years, and consequently no exercise of the right claimed. This is not evidence of a character to support the alleged easement: see *Hollins v. Verney*(13). In short, to support such an easement, (i) the plaintiffs must show acts by

(1) (1845) 5 Q. B. 701.

(2) (1860) 8 H. L. 348.

(3) (1862) 1 B. & S. 940.

(4) (1852) 1 Macq. Sc. Ap. 305.

(5) (1864) 1 W. R. 230.

(6) (1867) 8 W. R. 268.

(7) (1871) 15 W. R. 295.

(8) (1873) 20 W. R. 237.

(9) (1881) 1 L. R. 7 Cal. 145.

(10) (1866) 3 H. L. 330.

(11) (1884) L. R. 13 Q. B. D. 131.

(12) (1810) 3 Taunt. 99.

(13) (1884) L. R. 13 Q. B. D. 204.

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themselves or their predecessors for the statutory period, and (ii) the easement claimed must not be destructive of rights *in toto*. On the other hand, the plaintiffs are bound to prevent water from flowing over the defendants' lands; if they do not do so, they commit a nuisance. Besides, the period during which Sukchand held the lands should be excluded.

Lastly, it is submitted, that the onus of proving the damages was wrongly placed on the defendants.

*Babu Nakini Ranjan Chatterjee (Dr. Rashbehary Ghose with him)* for the respondents. A hypothetical case has been set up for the plaintiffs in this Court. The plaintiffs claimed only a prescriptive right and not a customary right. The plaintiffs in each case do not say that they collectively take the water to the village, but each claims the right with respect to his land, a prescriptive right to take water over other people's land; the question of reasonableness does not therefore arise.

[RAMPINI, J. Can you acquire easement so as to destroy the servient tenement?]

No. But the opposite side cannot use the land in a different manner for their own advantage to the prejudice of our easement. The Calcutta cases cited on behalf of the appellants are all distinguishable. *Actual* user is not contemplated by S. 26 of the Limitation Act: see *Koylash Chunder Ghose v. Sonatun Chung-Barooie* (1) and *Oomur Shah v. Rumsan Ali* (2). Sukchand's case does not come under S. 27 of the Limitation Act. As to the case of *Hollins v. Verney* (3), cited by the other side, see Goddard on Easements, 5th Edn., pages 205-208.

As to the damages, no question of onus, it is submitted, arises here.

*Cur. adv. vult.*

July 7.

**RAMPINI AND PARGITER, JJ.** The suit out of which this second appeal arises was brought by the two plaintiffs along with ten similar suits instituted by other persons to establish a right of easement over the defendants' lands, namely, that they are

(1) (1891) I. L. R. 7 Calc. 132.

(2) (1868) 10 W. R. 363.

(3) (1884) L. R. 13 Q. B. D. 304.

entitled, by constructing an embankment across the river Soori and diverting the water of the river over the lands of mouza Duria, to convey the water over the first defendant's land on to their own land in order to irrigate it. A railway runs through the mouza and crosses the bed of the river by a long bridge built upon arches. The first defendant holds the railway cuttings on each side of the line and (as we understand the facts) the river water when diverted flows over a portion of his land and under some of the arches so as to irrigate the lands on both sides of the line. The water, as it flowed over the defendant's land (which is said to be lower than the adjacent lands) and under the arches was ordinarily prevented from flowing back into the river bed by some small bunds, but the defendants cut these bunds in the year 1302 and the water escaped back without irrigating the plaintiffs' land, and thus the plaintiffs' crops were damaged.

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The plaintiffs' and their fellow-villagers therefore brought these suits separately to recover damages.

Two questions arose,— *first*, whether the plaintiffs had the easement alleged, and, *secondly*, what amount of damages they were entitled to get.

Both the Lower Courts have found the question of the easement in favour of the plaintiffs, and the Lower Appellate Court has affirmed the amount of damages which the Munsif awarded them.

The defendants appeal. On their behalf Mr. Hill has contended (i) that the right claimed is not an easement, but is a customary right and it is one of the essential conditions of such a right that it must be reasonable; (ii) that even as an easement the right claimed must be reasonable; (iii) that the easement claimed infringes the first defendant's right to use his own land as he pleases and would indeed entirely destroy his rights in his property; (iv) that if the easement alleged be founded upon prescription it cannot be maintained, for the plaintiffs do not claim a right to erect bunds on the first defendant's lands, but to erect bunds on their own lands, and this can give them no prescriptive right to submerge the first defendant's lands; (v) that the plaintiffs when diverting the river water to irrigate

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their lands are bound to prevent it from flowing on to the defendant's land or to take it away if it does overflow there; and if they fail to do so, the overflow becomes a nuisance and the defendants may abate the nuisance; (vi) that the right is claimed only for seasons of drought and therefore there has been no continuity in its exercise, and so no easement can have been established; (vii) that the period of Sukchand's lease for the lands now held by the first defendant must be excluded in computing the period necessary for the acquisition of the easements; and (viii) that the onus of proving the damages has been misplaced.

With reference to the first and second of these pleas it is sufficient to say that the easement claimed in this suit is not a customary right and need not be reasonable and that there is nothing unreasonable in the easement as found by the lower courts to have been established by the plaintiffs.

The easement claimed by the plaintiffs will not destroy the defendant's enjoyment of his property. He has hitherto used the cuttings as fisheries. The easement claimed by the plaintiffs will not prevent the defendants using them as such or growing paddy on them in years when there is no drought or turning them into agricultural land, as they gradually silt up, and rise to the level of the plaintiffs' land, when the water of the Soori will no longer flow over them. The case of *Cooper v. Barber* (1) cited by Mr. Hill does not appear to be in point, as in that case the plaintiff had established no right of easement and could not have an easement for subsoil percolation; for where an easement cannot be prevented it cannot be acquired.

It is immaterial that the plaintiffs do not claim any right to erect bunds on the defendant's land. They claim the right by means of bunds erected on their own land to cause the water of the river to flow across the defendant's cuttings on to their land on the east. An easement of this nature may exist and may be established.

The plaintiffs when they have been found to have established an easement are not bound to prevent the water of the river flowing on to the defendant's land, nor are the defendants entitled to interfere with the flow of the water on to their lands caused

(1) (1810) 3 Taunt. 99.

in the exercise of the plaintiffs' rights. The cases of *Whalley v. Lancashire and Yorkshire Railway Company*(1) and *Rylands v. Fletcher*(2), relied on by the learned counsel for the appellant, do not appear to help the appellant, for no question of easement was involved in them.

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It is immaterial whether the exercise of the right is continuous, provided it has been exercised over a period of 20 years, during the periods of drought, when it could be taken advantage of. The case of *Hollins v. Verney*(3), cited by the learned counsel in support of his argument, seems to be of doubtful authority. In any case it was decided under the English Prescription Acts, and has no direct application to the present case.

We see no reason why the period of Sukchand's lease should not be taken into consideration in computing the period necessary for the acquisition of the easement. His right in the land is not shown to have been of a leasehold nature or in any way different from that of his successors, the defendants.

The onus of proving the damages has not been misplaced, though the Judge does not consider it to have been altogether satisfactorily discharged. He has, however, affirmed the findings of the Court of first instance on the question of damages. We accordingly dismiss the appeal and the analogous appeals with costs.

*Appeal dismissed.*

M. N. R.

(1) (1884) L. R. 13 Q. B. D. 131.

(2) (1866) 3 H. L. 330.

(3) (1884) L. R. 13 Q. B. D. 304.

## CRIMINAL REVISION.

1908  
June 28.

SUNDAR MAJHI

v.

EMPEROR.\*

*Arbitrator—Public servant—Mischief—Land-mark—Penal Code (Act XLV of 1860) ss. 21, 434.*

The parties to a proceeding under s. 145 of the Criminal Procedure Code by mutual consent referred the dispute as to the possession to the arbitration of A, and the Magistrate thereupon cancelled the proceedings under s. 145. The arbitrator in order to define the boundary erected certain pillars, which were destroyed by the accused, and they were in consequence convicted under s. 434 of the Penal Code:—

*Held* that the conviction was illegal, as A was not an arbitrator within the definition of s. 21, cl. (6) of the Penal Code, nor was he a public servant authorized to fix the pillars within the meaning of s. 434 of that Code.

**RULE** granted to the petitioner, Sundar Majhi.

This was a Rule calling upon the District Magistrate of Birbhum to shew cause why the conviction of the petitioner should not be set aside on the ground that Mr. Ahmad, under whose authority the boundary pillars had been set up, was not an arbitrator within the definition of s. 21, cl. (6) of the Indian Penal Code.

Proceedings under s. 145 of the Criminal Procedure Code were instituted by the Subdivisional Magistrate of Rampur Hât between the Manager of the Benagaria Mission and his tenants as the first party and the Rajah of Hetampur and his tenants as the second party, with respect to certain disputed lands on the border line of the villages Tadbandha and Mijhanpur which were claimed by the parties respectively. On a petition being put in by the parties the Magistrate, on the 24th November 1902, passed the following order:—

“A petition is filed today signed by both parties stating that they are willing to refer the whole dispute to the arbitration of A. Ahmad, Esq., District Magistrate of Birbhum, and to abide unconditionally by his decision in every respect.

\* Criminal Revision No. 488 of 1908, against the order passed by A. J. Laine, Sessions Judge of Birbhum, dated March 18, 1903.

This compromise naturally does away with the likelihood of an imminent breach of the peace which has in the Court's opinion existed hitherto, and consequently removes all reason for further action. The proceedings will accordingly be stopped, the constables remaining on the spot only till the arbitrator has decided all points in dispute. Such crops as may have been already cut by the Court's order will be apportioned to the parties by the arbitrator as he thinks fit."

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In the petition it was also stated that the parties agreed that whatever boundary should be fixed by the arbitrator, should be marked by definite boundary pillars.

Mr. Ahmad made his award and caused certain boundary pillars to be erected on the boundary line which he had fixed in his award. Shortly afterwards two complaints were made by the Manager of the Benagaria Mission stating that the tenants of Mijhanpur had been and were breaking down these boundary pillars. Thereupon, warrants were issued, and the petitioner was tried by the Subdivisional Magistrate of Rampur Hât and was, on the 18th March 1903, convicted under ss. 143 and 434 of the Penal Code and sentenced to two months' rigorous imprisonment. He appealed to the Sessions Judge of Birbhum who on the 5th May 1903 dismissed the appeal.

*Mr. Hill* for the Crown. The Magistrate trying the case under s. 145 of the Criminal Procedure Code was a Court of Justice, and he referred the dispute for decision to Mr. Ahmad as will be seen by perusal of the final portion of his order, which runs as follows:—"Such crops as may have been already cut by the Court's order will be apportioned to the parties by the arbitrator." Mr. Ahmad was appointed an arbitrator for the purpose of apportioning the crops, and would be a public servant within s. 21, cl. (6) of the Penal Code. He could only apportion the crops by ascertaining what lands were possessed by each side: in order to do that he had to define the boundary, which he did by erecting certain pillars. These pillars the accused has destroyed, and has, I submit, been rightly convicted under s. 434 of the Penal Code.

*Mr. P. L. Roy (Babu Joy Gopal Ghose with him)* for the petitioner. The duty of putting up the pillars was not enjoined upon the arbitrator by the Magistrate. It does not necessarily follow, because Mr. Ahmad was appointed to apportion the crops,

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that he had to erect boundary marks. In order to convict the accused under s. 434 of the Penal Code, Mr. Ahmad must be authorized by the Court to erect the pillars. The pillars were erected at the request of the parties. The Magistrate does not mention anything about erecting pillars in his order. No matter was referred by any Court to Mr. Ahmad for his decision. He was appointed arbitrator by the parties, and the Court simply agreed to it. The portion of the order referred to by Mr. Hill does not constitute Mr. Ahmad an arbitrator under s. 21, cl. (6) of the Code. It was, I submit, only a suggestion by the Court of what Mr. Ahmad might do in disposing of the matter. The conviction is illegal and should be set aside.

**RAMPINI AND HANDLEY JJ.** This is a Rule calling upon the Magistrate of the district of Birbhum to shew cause why the conviction and sentence in the case of the applicant Sundar Majhi should not be set aside on the ground that Mr. Ahmad, under whose authority the boundary pillars had been set up, was not an arbitrator within the definition of section 21, clause (6) of the Indian Penal Code. The petitioner has been convicted and sentenced under section 434 of the Code for having destroyed a landmark fixed by the authority of a public servant. Mr. Roy, who obtained this Rule on his behalf, contends that the conviction is bad, because, although Mr. Ahmad who put up the boundary pillar was a public servant and Collector, yet he did not put up the pillar as such, but in his capacity of arbitrator, or person to whom a certain matter, namely, the dispute under section 145 of the Code of Criminal Procedure, had been referred by the parties themselves and not by the Court.

Mr. Hill on behalf of the Crown shews cause against the Rule; but after looking into the orders passed in the case, we think that the ground upon which the Rule was obtained was a good ground and that the Rule must be made absolute. We see from the order of the Subdivisional Magistrate of Rampur Hât on whose file the section 145 case was pending, that Mr. Ahmad was not appointed by him to be arbitrator, nor was any matter referred to him for decision. There was an application before the Subdivisional Magistrate to the effect that the



parties were willing to refer the question of the lands in dispute to Mr. Ahmad; and that being so, and as there was no further likelihood of breach of the peace, the proceedings under section 145, Criminal Procedure Code, were stayed. In these circumstances it appears to us that Mr. Ahmad was not a public officer authorized to fix the boundary pillars, but was a private person to whom the parties chose to refer the dispute between them for decision.

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Mr. Hill relies on the last sentence in the order of the Subdivisional Magistrate, which is as follows:—"Such crops as may have been already cut by the Court's order, will be apportioned to the parties by the arbitrator." We do not think, however, that the Subdivisional Officer meant by this to appoint Mr. Ahmad to apportion the crops. It was in our opinion a mere declaration of what he thought Mr. Ahmad should do in disposing of the case.

Furthermore, we do not think that Mr. Ahmad was authorized to put up the boundary pillars. If he did put them up, he did not do so in his capacity of public servant within the meaning of section 434, Indian Penal Code.

The Rule is therefore made absolute and the conviction and sentence in the case of the applicant set aside. The fine if paid must be refunded.

*Rule absolute.*

D. S.

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The parties to a proceeding under s. 145 of the Criminal Procedure Code by mutual consent referred the dispute as to the possession to the arbitration of A, and the Magistrate thereupon cancelled the proceedings under s. 145. The arbitrator in order to define the boundary erected certain pillars, which were destroyed by the accused, and they were in consequence convicted under s. 434 of the Penal Code:— <i>Held</i> that the conviction was illegal, as A was not an arbitrator within the definition of s. 21, cl. (6) of the Penal Code, nor was he a public servant authorized to fix the pillars within the meaning of s. 434 of that Code.		A rule in the Police Code to the effect that, when any <i>surveillé</i> is at home, proof of his presence can be secured by a taking a thumb-impression on the report, does not impose any obligation on the <i>surveillé</i> to give the thumb-impression,	

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and he cannot be forced to do so. Before an act can amount to an assault under s. 361 of the Penal Code it is necessary that a gesture or preparation should be made by a person which would cause another to apprehend that the person was about to use criminal force to him then and there. A preparation taken with words which would cause him to apprehend that criminal force would be used to him, if he persisted in a particular course of conduct, does not amount to an assault. Where a <i>surveillé</i> on a domiciliary visit being paid to him by a police officer refused to allow his thumb-impression to be taken, and on the officer attempting to take it, produced a <i>lathi</i> saying he would not allow the impression to be taken, and, if any one asked for it, he would break his head: <i>Held</i> , that the act of the <i>surveillé</i> did not amount to an assault, and that his conviction under s. 353 of the Penal Code should be set aside. <i>Held</i> , further, that, if his act had in itself amounted to an offence, s. 99 of the Penal Code would apply. <i>BIRBAL KHALIFA v. EMPEROR</i> , I L. R. 30 Calc. ... 97	
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_____ ss 502, 505—Human food, destruction of articles, for—Purchase of damaged rice intending to sell it as food for pigs—Order for its destruction—Circumstances necessary to justify such order.	
In order to justify an order under s. 505 of the Calcutta Municipal Act of 1893, the Magistrate must be satisfied, and there must be a finding in his judgment that the article directed to be destroyed comes within s. 502 of the Act, and is either exposed or hawked about for sale, or deposited in, or brought to, any place for the purpose of sale or preparation for sale, and is intended for human food. Where certain damaged rice which had been purchased by a person who intended to sell it as food for pigs was ordered to be destroyed by a Magistrate under s. 505 of the Calcutta Municipal Act, and the judgment of the Magistrate contained no finding that the rice was bought for the purpose of sale or that it was intended for human food, but contained a finding that there always was a risk that it might be sold for human consumption to poorer classes, or might be used in a flour mill worked by unscrupulous persons: <i>Held</i> , that the fact that this danger	

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Calcutta Municipal Act— <i>concluded.</i> existed did not justify the order, and that until some attempt was made to sell the rice for consumption by the poorer classes, the Corporation was not justified in destroying the property of a man who was disposing of it in a way which was perfectly legitimate.	
CHUNDEA COOMAR BISWAS v. CALCUTTA CORPORATION, I. L. R. 30 Calc. ...	421
Calcutta Municipal Consolidation Act (B. O. II of 1888) ss. 247, 250, 427. <i>See</i> BUILDING ...	317
Cancellation of document not required to be set aside. <i>See</i> DOCUMENT, EXECUTION OF ...	433
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Certificate of Sale. <i>See</i> SALE ...	1
Cess, whether a charge on an estate. <i>See</i> ARREARS OF CESS ...	778
Cess Act (Bengal Act IX of 1880, s. 99. <i>See</i> ARREARS OF CESS ...	778
Cesses. <i>See</i> REVENUE SALE ...	794
Chambers— <i>Civil Procedure Code (Act XIV of 1882) ss. 295, 310A—Sale in execution—Judgment-debtor, deposit by—Rateable distribution.</i>	
Section 295 of the Civil Procedure Code does not apply to a deposit made by a judgment-debtor under s. 310A of the Code. The words "for payment to the decree-holder" in s. 310A mean that the decree-holder is the person solely entitled to the money paid into Court. <i>Hari Sundari Dasya v. Shashi Bala Dasya</i> , 1 C. W. N. 195, and <i>Bihari Lal Paul v. Gopal Lal Seal</i> , 1 C. W. N. 695, followed.	
ROSHUN LALL v. RAM LALL MULLICK, 1 L. R. 30 CALC. ...	262
Charge. <i>See</i> DEFAMATION ...	402
Charges, misjoinder of— <i>Defective charge—Appeal—Trial by jury—Forgery—Using as genuine forged document—Cheating—Criminal Procedure Code (Act V of 1898), s. 423—Penal Code (Act XLV of 1860) ss. 467, 468, 471 and 477—Indian Registration Act (Act III of 1877) s. 82.</i>	
It was alleged by the prosecution that the accused had forged the	

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Charges, misjoinder of— <i>concluded.</i> registration endorsement and stamp on the back of a <i>kabala</i> by which he had sold certain lands to D, and that he had produced before a Sub-Registrar a forged mortgage-deed, whereby he purported to mortgage to D the identical lands sold under the <i>kabala</i> ; it was also alleged that the accused had produced the said mortgage deed, before the Secretary of a Loan Office, in order to induce that officer to grant him a loan. The accused was tried in one trial on charges under ss. 467, 468, 469, 477 of the Penal Code with regard to the alleged forgery of the <i>kabala</i> ; under s. 82 of the Registration Act, and ss. 467, 468 and s. 471 of the Penal Code with regard to the mortgage deed, and also on charges under ss. 471 and 477 of the Penal Code with reference to the attempt to cheat the Loan Office. The accused was convicted under ss. 467, 477 and s. 471 of the Penal Code:— <i>Held</i> , on appeal, (i) That as the alleged forgery of the <i>kabala</i> and the presentation of the forged mortgage deed to the Secretary of the Loan Office could not be said to be parts of the same transaction, there had been a misjoinder of charges; (ii) that the charge to the jury was defective, inasmuch as it did not show what the facts of the case were, what the evidence adduced was, or what was the case for the accused; (iii) that inasmuch as the evidence on the record showed that there was a case which ought to be investigated by a jury, the accused should be retried.— <i>BIRENDA LAL BHADURI v. EMPEROB</i> , I. L. R. 30 Calc. ...	822
Charter Act (24 and 25 Vict. C. 104), ss 14, 15. <i>See</i> JURISDICTION	598
—s. 15. <i>See</i> JURISDICTION ...	508
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—SS. 53, 582. <i>See</i> COURT FEE	516
—S. 111, III. (d). <i>See</i> SET-OFF	1066
—SS. 206, 595, 596. <i>See</i> LEAVE TO APPEAL TO PRIVY COUNCIL ...	679
—S. 211. <i>See</i> INTEREST	506
—SS. 232, 248. <i>See</i> REVIVOR	979
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—S. 295, Prov. (C). <i>See</i> MORTGAGE ...	953
—SS. 244, 287(c). <i>See</i> APPEAL ...	617

ss. 244 and 311—*Sale—Fraud—Execution proceedings—Partition—Mortgage.*

After a sale has been confirmed, an application to set it aside for fraud is maintainable under s. 244 of the Civil Procedure Code. *Malkarjun v. Narhari*, I. L. R. 25 Bom. 837, explained. A co-sharer, who has obtained a portion of the mortgaged properties on a partition after the

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Civil Procedure Code (Act XIV of 1882)— <i>continued.</i>	
execution of a mortgage bond by the other co-sharers hypothecating their undivided shares in the said properties, and who has been made a party to the mortgage suit, is a necessary party to the execution proceedings. The sale of his share of the property, held in execution of a decree obtained in his presence upon the mortgage bond, is not a nullity, although he was not made a party to the execution proceedings; but can be set aside in a proceeding properly set on foot for that purpose. <i>Ram Chandra Mukerjee v. Ranjit Singh</i> , I. L. R. 27 Calc. 242, referred to. <i>GOLAM AHAD CHOWDHRY v. JUDHISTER CHUNDRA SHAHA</i> , I. L. R. 30 CALC. ...	142
—SS. 244, cl (C), 278, 280, 283. <i>See</i> APPEAL ...	134
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—SS. 375, 506 and 523—*Arbitrator—Agreement to refer to arbitrator—Suit—Adjustment of suit within the meaning of s. 375—Agreement not in writing.*

Where a party to an agreement has petitioned to refer matters in

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Civil Procedure Code (Act XIV of 1882)— <i>concluded.</i>	
dispute to arbitration: <i>Held</i> , that the Court has no power to make a decree under s. 375 "that the agreement to refer to arbitration be recorded, and that in terms of the said agreement the suit be referred to an arbitrator with all such powers and authorities as are vested in arbitrators under the provisions of the Civil Procedure Code, and that the arbitration be finished within six months from the date on which the decree shall be completed and filed, and that the records of the suit be delivered over to the arbitrator." Such a decree is in the nature of an order under Chapter XXXVII of the Code. Where an agreement to refer to arbitration is not in writing, s. 523 does not apply, neither does this section apply to an agreement to refer to arbitration in a pending suit. <i>Ghulam Khan v. Muhammed Hassan</i> , I. L. R. 29 Cal. 167, referred to. <i>Harivalabdas Kalianadas v. Utamohand Manekchand</i> , I. L. R. 4 Bom. 1, doubted. <i>Per MACLEAN O. J.</i> A mere agreement to refer to arbitration is not an adjustment of the suit within the meaning of s. 375: under such section the subject-matter of the suit must be adjusted by the agreement. <i>Pragdas Sagurmall v. Girdhardas Mathuradas</i> , I. L. R. 26 Bom. 76, distinguished. <i>Per HILL AND STEVENS JJ. Quære</i> : Whether an agreement to refer to arbitration could under no circumstances be treated as an adjustment of the suit, as contemplated by s. 375.	
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— ss. 387, 399. <i>See</i> PRACTICE ...	934
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— ss. 430, 435. <i>See</i> FOREIGN CORPORATION, SUIT BY ...	103

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Compensation—Apportionment of compensation money—Landlord and Tenant—Land Acquisition Acts (I of 1894 and XVIII of 1886)—Rent fixed in perpetuity—Bengal Tenancy Act (VIII of 1885) s. 59, sub s (2).	
In apportioning compensation money, awarded under the Land Acquisition Act, between the landlord and the tenure-holder, the Court ought to proceed on the principle of ascertaining what the value of the interest of the landlord is on the one hand, and that of the tenant on the other, and to divide the sum	

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Compensation—concluded.	
awarded between them in accordance with these values. Where the rent is fixed in perpetuity the landlord is not entitled to more than the capitalized value of his rent. <i>Gordon Stuart &amp; Co. v. Maharaja Mohatab Chunder Bahadur</i> , 1 Marsh. 490; <i>Raye Kissory Dassu v. Nilcant Day</i> , 20 W. R. 370; <i>Godadhar Dass v. Dhunput Singh</i> , 1 L. R. 7 Calc. 585; <i>Dunne v. Nobo Krishna Mookerjee</i> , 1 L. R. 17 Calc. 144; <i>Rajah Khetter Kristo Mitter v. Kumar Dinendra Narain Roy</i> , 3 C. W. N. 202; and <i>Shama Prosunno Bose Mozumder v. Brakoda Sundari Dasi</i> , 1 L. R., 23 Calc., 146 considered.	
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...to accused, order for payment of—Case which is false as well as frivolous or vexatious—Criminal Procedure Code (Act V of 1898) s. 250.	
<i>Held</i> , by the Full Bench (PRINSEP Off. C. J. dissenting), that an order under s. 250 of the Code of Criminal Procedure, for the payment of compensation to an accused person, can be made in a case which is false as well as frivolous or vexatious. <i>Parsi Hajra v. Bandhi Dhanuk</i> , 1 L. R. 28 Calc. 251, overruled.	
BENI MADHUB KURMI v. KUMUD KUMAR BISWAS, 1 L. R. 30 Calc. ...	123
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A petition to the Collector as the superior officer of the Court of Wards directed against one of his official inferiors, a subordinate officer of the Court of Wards' <i>cutchery</i> , asking the Collector, as the head of the department,	

## Complaint—continued.

to redress the grievances of the petitioner, is not a complaint within s. 4. cl. (h) of the Code of Criminal Procedure. Where on such a petition being presented the Collector saw the petitioner and got him to repeat the statement made in the petition on oath and dealing with it judicially as if it were a complaint dismissed it, without giving the petitioner an opportunity of calling his witnesses, and ordered his prosecution under s. 211 of the Penal Code: *Held*, that the order for the prosecution of the petitioner under s. 211 of the Penal Code should be set aside, as the Collector was not justified in arbitrarily turning a departmental complaint into a criminal complaint, and that if he had been justified in taking the course that he did, he should have given the petitioner an opportunity of calling his witnesses and proving his allegations.

JAGOBUNDDH KARMAR v. EMPEROO, 1 L. R. 30 Calc. ... 415

Dismissal of complaint—Complainant, examination of—False charge—Criminal Procedure Code (Act V of 1898) ss. 156, 159, 200, 202, 203—Penal Code (Act XLV of 1860) ss. 211—Jurisdiction of Magistrates.

A complaint was made to a Magistrate who, without examining the complainant, sent the petition of complaint under s. 168 of the Code of Criminal Procedure to the police for enquiry, and upon receipt of the police report directed a Sub-Deputy Magistrate to make a preliminary inquiry into the case under s. 159 of the Code, and on receipt of his report the Magistrate, not being satisfied with it, cross-examined the complainant and some of his witnesses, examined some witnesses sent up by the police, and then dismissed the complaint under s. 203 of the Code, and directed the prosecution of the complainant under s. 211 of the Penal Code:—*Held*, that the order dismissing the complaint was illegal, the Magistrate having no jurisdiction to deal with the case or

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<b>Complaint.—concluded.</b>		<b>Concurrent Decision on facts.</b>	
dismiss it under s. 203 of the Criminal Procedure Code without complying with the requirements of the law as laid down in ss. 200 and 202 of that Code.		See PRIVY COUNCIL, PRACTICE OF	303
LOKENATH PATRA v. SANYASI CHARAN MANNA, I. L. R. 30 Calc. 923		<b>Conduct and intention of parties.</b>	
<b>Complaint, meaning of—Prosecution for adultery of enticing away a married woman—Criminal Procedure Code (Act V of 1898), ss. 4, cl. (h), 199.</b>		See LEASE, CONSTRUCTION OF	383
The word "complaint," referred to in s. 199 of the Code of Criminal Procedure, means "complaint" as defined by s. 4, cl. (h) of that Code. <i>Jatra Shekh v. Reazat Shekh</i> , I. L. R. 20 Calc. 483, distinguished.		<b>'Confession and avoidance,' Plea of.</b>	
TARA PRASAD LAHA v. EMPEROR, I. L. R. 30 Calc. ... 910		See RENT, SUIT FOR	947
<b>Compromise—Minor—Guardian of Minor—Proper course to set aside a compromise decree—Appeal—Adoption, suit to set aside—Guardians and Wards Act (VIII of 1890), ss. 47, 48—Civil Procedure Code (Act XIV of 1883), ss. 443, 622.</b>		<b>Confinement, illegal, in cell.</b>	
When a compromise, and a decree based upon it, are sought to be set aside on the ground that the compromise was entered into by the guardian of a minor defendant without the leave of the Court having been granted after a judicial determination that it was for the minor's benefit: <i>Held</i> , that the proper course to set aside such a decree would be by way of an application for review in the first Court or by a separate suit, but not by an appeal from the compromise decree. <i>Biraj Mohini Dasi v. Chinta Moni Dasi</i> , 5 C. W. N. 877, followed. Section 48 of the Guardians and Wards Act does not prevent a widow, who has been appointed by the District Judge, under that Act, guardian of a minor as her husband's adopted son, from maintaining a suit for a declaration that the minor was not the adopted son of her husband. <i>BAKEAL MONI DASSI v. ADWITA PRASAD ROY</i> , I. L. R. 30 Calc. ... 613		See WRONGFUL CONFINEMENT	95
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		<b>Conspiracy, Evidence of.</b>	
		See EVIDENCE	983
		<b>Conspirator, statements by, relevancy of.</b>	
		See EVIDENCE	983
		<b>Contract—Breach of contract—Damages, measures of—Delivery, specific period for—Seller's option—Notice of inability to perform contract.</b>	
		If a vendor has any specific period of time allowed to him to deliver goods, and before the time has elapsed gives notice to the purchaser that he will be unable to complete the delivery, the purchaser not rescinding the contract, the measure of damages is the difference between the contract price and the price of the subject-matter on the last day of the period within which the delivery ought to have been made. The terms "shipment at seller's option during August-September" in a contract do not mean that the seller has an optional period of two separate months in which he can deliver, but they refer merely to the character of the delivery. <i>Leigh v. Paterson</i> , 8 Taunt. 540, referred to.	
		<i>MACKERTICH v. NOBO COOMAR RAY</i> , I. L. R. 30 Calc. ... 477	
		—Breach of Contract—Re-sale, right of Contract Act (IX of 1872), s. 107—Inferiority in quality—Right to reject—Proprietary right, exercise of—Damages.	
		Unless there is something in the	

**Contract—continued.**

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contract to the contrary, a buyer cannot be compelled to take goods with an allowance for inferiority in quality. But if the right to reject the goods as being of an inferior quality is not exercised by the defendant when the goods are tendered, but a right of a proprietary character in respect to the goods exercised by directing delivery to be made to third parties, then the defendant accepts the goods; and if they remain in the possession of the plaintiff, then he has a lien upon them, and he is entitled, under s. 107 of the Contract Act, to re-sell the goods and recover as damages the difference between the contract price and the price at the re sale. *HABIDAS KHANDELWAL v. KALUMULL, I. L. R. 30 Calo.* ... 649

*Principal and agent—  
Broker—Title—Brokerage.*

A contracted with a broker to negotiate for a loan of money on the first mortgage of properties, and agreed to pay brokerage. The broker brought a creditor who was willing to advance the amount, and actually placed money in the hands of the attorney. The attorney found certain defects in A's title, and the transaction fell through. *Held*, that a broker having negotiated the loan and found a lender willing to lend the amount, he was entitled to his brokerage, although the transaction was not complete by reason of the inability of A to satisfy the attorney as to the title. *Held*, further, that, regard being had to the terms of the agreement, the broker was not bound to prove some real defect in the title in order to recover the remuneration claimed.

*ELIAS v. GOVIND CHUNDER KHATICK, I. L. R. 30 Calo.* ... 202

*Suit for damages for breach of contract—Non-delivery—Tender of Price—Readiness and willingness to pay without making actual tender of money—Contract Act (IX of 1872) s. 51.*

In a suit for damages for breach of a contract to deliver

**Contract—concluded.**

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cotton, there was evidence that the plaintiffs had called on the defendant to perform his part of the contract by giving delivery, but that he had refused to do so and had repudiated the contract. The plaintiffs prove that they were ready and willing to carry out their part of the bargain and had made preparations with the object of having the money ready to pay for the cotton on delivery. *Held*, that under s. 51 of the Contract Act (IX of 1872) they had done sufficient to entitle them to recover damages, and were not obliged to show that they made an actual tender of the money. *SHRIRAM EUPHRAM v. MADAN GOPAL GOWARDHAN, I. L. R. 30 Calo.* ... 865

*Contract Act (IX of 1872) ss. 11, 19, 64, 65. See MINOR* ... 539

*See MORTGAGE* ... s. 44. ... 953

*See CONTRACT* ... s. 51. ... 865

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*Contract for Sea-Insurance. See BILL-OF-LADING* ... 565

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*Convictions for house-trespass and hurt, legality of. See RIOTING, CHARGE OF* ... 288

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Co-sharers—Building, right to removal of—Discretion of Court—Decree, contents of.	
Where several parties are joint-owners of land and one of them erects a wall upon the land without the consent of his co-sharers, the Court should not interfere to order the demolition of the wall when there is no evidence to shew that injury has been done to the party complaining, and that reasonable steps were taken in time to prevent the erection of the wall. <i>Najju Khan v. Imtiazuddin</i> , I. L. R. 18 All. 116, dissented from. <i>Nocury Lall Chuckerbutty v. Bindabun Chunder Chuckerbutty</i> , I. L. R. 8 Calc. 708, <i>Shamnugger Jute Factors Co. v. Ram Narain Chatterjee</i> , I. L. R. 14 Calc. 189, and <i>Joy Chunder Rukhit v. Bippro Churn Rukhit</i> , I. L. R. 14 Calc. 236, followed. In a suit like the present it is of the utmost importance that the decree should state the precise nature of the relief granted. <i>FAZILATUNNESSA v. IYAZ HASSAN</i> , I. L. R. 30 Calc. ...	901
Costs. <i>See</i> MESNE PROFITS ...	536
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Court. <i>See</i> PRIVY COUNCIL, PRACTICE OF	309
Courts basing decision on different grounds <i>See</i> PRIVY COUNCIL, PRACTICE OF ...	303
Court-fee. <i>See</i> DECREE ...	501
———Decree—Memorandum of appeal, amendment of Civil Procedure Code (Act XLV of 1882) ss. 53, 582—Court-fees Act (VII of 1870).	
In the generality of cases an Appellate Court cannot pass a decree for a larger amount than that claimed in the memorandum of appeal, unless, before the judgment is pronounced, an amendment of the memorandum of appeal is allowed and the additional court-fee paid in. <i>PENCIVAL v. COLLECTOR OF CHITTAGONG</i> , I. L. R. 30 Calc. ...	516
Court-fees Act (VII of 1870), Sch. II, art. 17, cl. (iii) and s. 7, cl. iv (c). <i>See</i> DECLARATORY DECREE	788

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Court-fees Act (VII of 1870) ss. 8, 11. <i>See</i> DECREE ...	501, 516
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Court-fee Stamp, sale of—“Sale”—Exchange—Transfer of stamp on promise that one of equal value would be returned—Court-fees (Act VII of 1870) s. 34, cl. (3).	
Where a mukhtear who had purchased a court-fee stamp for a client transferred it to another client the latter having agreed to return to the mukhtear another court-fee stamp of the same value, and was convicted of an offence under s. 34 of the Court-fees Act:— <i>Held</i> , that there had been no ‘sale’ of the stamp within meaning of s. 34 of the Court-fees Act (VII of 1870), and that the conviction should be set aside. <i>KEDAR NATH SHAHA v. EMPEROR</i> , I. L. R. 30 Calc. ...	921
Court of Wards, petition to Collector against officers of. <i>See</i> COMPLAINT ...	416
Creditor, right of suit by—Debt incurred by Receiver— <i>Est. de liability of—Receiver, personal liability of—Executor or Trustee, nature of liability of—Banian, lien of—Damages.</i>	
A creditor is entitled to proceed against the representative of an estate for recovery of debt incurred by the Receiver during the management of the estate by him: the right to maintain such suit against the representative is founded on the just and equitable principle that as the acts of a Receiver, acting within his authority, are the acts of the Court, the estate cannot be permitted to enjoy the benefit of those acts, without being held responsible for the obligations arising out of them. <i>Burt, Boulton, &amp;c., Hayward v. Bull</i> , [1895] 1 Q. B. 276, referred to and explained. A Receiver occupies a position towards an estate in his hands different from that of an executor or trustee: the latter not acting through or under directions of the	



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Criminal Intimidation— <i>Threat to ruin by cases—"Injury"—Penal Code (Act XLV of 1860) ss. 44, 503 and 506.</i>	
<p>In order to convict a person of criminal intimidation under s. 503 of the Penal Code, it must be found that there was a threat by him to another person of injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested. Where the petitioner who threatened to ruin the complainant by cases was convicted of criminal intimidation under s. 506 of the Penal Code: <i>Held</i>, that the conviction could not stand. Had the threat been to ruin the complainant by false cases, the offence of criminal intimidation would have been committed; but as the threat was to ruin him by cases, it could not be assumed that by cases were meant false cases. If the cases were not false, the mere fact that they were instituted for the purpose of persecuting the complainant would not bring them within the definition of the term "injury." <i>JOWAHIR PATTAK v. PARBHOO AHIR</i>, I. L. R. 30 Calc. ...</p>	418
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<i>Held</i> , by the Full Bench (Prinsep, J., dissenting) that an order dismissing, for default, an appeal from a decree is a 'decree' within the meaning of s. 2 of the Code of Civil Procedure. <i>Jagarnath Singh v. Budhan</i> , I. L. R. 23 Calc. 115, and <i>Anwar Ali v. Jaffer Ali</i> , I. L. R. 28 Calc. 827 overruled. <i>Ramchandra Pandurang Naik v. Madhav Purushottam Naik</i> , I. L. R. 16 Bom. 23, referred to. <i>BADHA NATH SINGH v. CHANDI CHARAN SINGH</i> , I. L. R. 30 Calc. ...	660
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Deeds, interpretation of— <i>Grant, construction of—Grant by way of lease—"Istemrari mokurari"—Grant for life—Tenure, permanent and hereditary—Grant for maintenance—Impartible Raj—Declaratory suit—Bengal Tenancy Act (VIII of 1885) ss. 106, 107, 109—Limitation Act (XV of 1877), Sch. II, Art. 14—Civil Procedure Code (Act XIV of 1882) s. 375—Registration Act (III of 1877) ss. 17, 49.</i>	
A grant was made of certain villages by the proprietor of an impartible Raj to his wife in <i>istemrari mokurari</i> , at a fixed annual rent, the deed containing the following covenant: "I the declarant, or any representatives, have and shall have no claim, right or dispute thereto, except the aforesaid reserved rent." <i>Held</i> , (1) that the use of the words ' <i>istemrari mokurari</i> ' in the lease was not sufficient to create a permanent and hereditary tenure; and (2) that the words excluding the claim of, or right of interference by, the grantor or his representative did not necessarily import the creation of a permanent and hereditary tenure, but might fairly be construed as only to mean that the grantor or his representatives would not have the power to disturb the grantee during her lifetime. <i>AGIN BINDH UPADHYA v. MOHAN BIKRAM SHAH</i> , I. L. R. 30 Calc. ...	20
Defamation— <i>Charge—Publication—Malice, omission to apologise no proof of—Penal Code (Act XLV of 1860) ss. 499 and 500—Criminal Procedure Code (Act V of 1898) s. 222.</i>	
Where an accused person was convicted of defamation under s. 500 of the Penal Code, upon a charge which set out that the defamation was committed on or about the 12th day of April, and afterwards, by describing the complainant as a <i>Brithiul Bania</i> : <i>Held</i> , that the charge was not a proper charge, inasmuch as it did not set forth the particular occasions on which the defamation was said to have been committed, so as	

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to give the accused person an opportunity of defending himself with reference to each act alleged to have been committed by him. Where the accused, who was the collecting <i>panchait</i> of his village, was alleged to have defamed the complainant by giving a <i>chautidari</i> receipt to him, in which he was described by the designation of <i>Brithial Bania</i> : <i>Held</i> , that the delivery of such a receipt was not a publication such as would render the accused liable to punishment for defamation, nor could the omission of the accused to apologise to the complainant subsequently, for the use of the caste designation, be taken as indicating that he used it at the time with a malicious intention. <i>BISHWANATH DASS v. KESAB GANDHABAIK</i> , I. L. R. 30 Cal. ...	402	<b>SHARERS</b> ...	901
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<b>Delivery of Verdict.</b> <i>See</i> <b>TRIAL BY JURY</b> ...	485	<b>Dispossession—Symbolical possession, effect of—Civil Procedure Code (Act XIV of 1882), ss. 318, 335—Jurisdiction.</b>	
<b>Deposit in Court—Civil Procedure Code (Act XIV of 1882) s. 310A—Sale in execution of decree—Co-sharer, deposit by.</b>		Symbolical possession does not amount to dispossession as contemplated by s. 335 of the Code of Civil Procedure. <i>IBRAHIM MULLICK v. KAMJADU RAKSHIT</i> , I. L. R. 30 Cal. ...	710
A person claiming under the Mahomedan law a share in some immoveable property which has been sold in execution of a decree against his co-sharers cannot come in and make a deposit under s. 310A of the Civil Procedure Code. <i>Ramchandra v. Rakhmabai</i> , I. L. R. 23 Bom. 460; <i>Pareesh Nath Singha v. Nabogopal Chattopadhyaya</i> , I. L. R. 29 Cal. 1, referred to. <i>Srinivasa Ayyangar v. Ayyathorai Pillai</i> , I. L. R. 21 Mad. 416, distinguished. <i>ABDUL RAHAMAN v. MATIYAR RAHAMAN</i> , I. L. R. 30 Cal. ...	425	<b>Dissolution of Limited Company.</b> <i>See</i> <b>EXECUTION OF DECREES</b> ...	961
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		<b>Divorce—Divorce Act (IV of 1869) ss. 7, 11, 45—Parties—Intervention—Jurisdiction—Alleged adulteress, application by—Civil Procedure Code (Act XIV of 1882) s. 32.</b>	
		In a wife's suit for divorce against the husband on the ground of incestuous adultery, the court has no power under the Indian Divorce Act (IV of 1869) to allow the alleged adulteress to intervene. The words "all proceedings under this Act between party and party" in section 45 of the Act apply only to proceedings after the parties to the suit have been determined, and the parties can only be determined in accordance with the provisions of the Act. S. 7 of the Act does not apply to procedure. S. 32 of the Civil Procedure Code (Act XIV of 1882) cannot apply to the case of substitution, dismissal, or addition of parties in divorce proceedings. <i>Bell v. Bell</i> , L. R. 8 P. D. 217, <i>Abbott v. Abbott</i> , 4 B. L. R. (O. C.) 51, and <i>Lowe v. Lowe</i> , 1899 P. 203, referred to. <i>RAMSAY v. BOYLE</i> , I. L. R. 30 Cal. ...	489

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Divorce—*Parties—Alleged adulteress, application by.* BAILEY v. BAILEY, I. L. R. 30 Calc. ... 490(note)

—*Wife's costs—Dismissal of wife's petition—Liability of husband—Deposit or security for costs.*

In a divorce suit where it is shown that the wife has no money of her own, the mere fact that no deposit has been made or security given for payment of the wife's costs, is no obstacle to the making of an order against the husband to pay her costs, though her petition is dismissed. *Robertson v. Robertson*, L. R. 6 P. D. 119; *Otway v. Otway*, L. R. 13 P. D. 141, and *Proby v. Proby*, I. L. R. 5 Calc. 357 referred to. BOYLE v. BOYLE, I. L. R. 30 Calc. ... 631

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Document, execution of—*Signature, sufficiency of—Limitation Act (XV of 1877) Sch. II, Arts. 91 and 142—Suit to recover possession of immoveable property—Cancellation of document not required to be set aside—Fraud.*

A document is a nullity where the executant of it signed only on the first page, but did not sign on the other pages, having discovered that it was not in accordance with the terms previously agreed upon; such a document does not require to be set aside or cancelled in order to entitle any person to the possession of the property covered by it as against the person in whose favour it stands. *Thoroughgood's case*, 2 Co. Rep. 9; *Foster v. Mackinnon*, L. R. 4 C. P. 704; *Sham Lal Mitra v. Amarendra Nath Bose*, I. L. R. 23 Calc. 480, and *Baghubar Dyal Sahu v. Bhikya Lal Misser*, I. L. R. 12 Calc. 69, referred to. A suit to recover possession of immoveable property by setting aside a document on the ground of fraud, but which document does not require to be set aside or cancelled is governed by Article 142 and not by Article 91, Schedule II of the

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Limitation Act (XV of 1877). BANKU BHARY SHAHA v. KRISTO GOBINDO JOARDAR, I. L. R. 30 Calc. ... 438

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Basement—*Customary right—Use of water and water-course—Riparian rights—Irrigation—Continuous use—Interruption—Unreasonable rights—Nuisance.*

An easement which is not a customary right need not be reasonable. An easement may be established of the right to cause river water to flow across the servient tenement on to the dominant tenement for the purpose of irrigation, by means of embankments erected on the dominant tenement. In establishing such easement, it is immaterial whether the exercise of the right is continuous, provided it has been exercised for the statutory period, during seasons of drought, when it could be taken advantage of. *Cooper v. Barber*, 8 Taunt. 99, *Whalley v. Lancashire and Yorkshire Railway Company*, L. R. 19 Q. B. D. 131, and *Rylands v. Fletcher*, 3 H. L. 330, distinguished. *Hollins v. Verney*, L. R. 13 Q. B. D. 304, doubted. BUDHU MANDAL v. MALIAT MANDAL, I. L. R. 30 Calc. ... 1077

—*Prescription—Prescriptive right to the use of water—Storage of water in another's tank for the purposes of irrigation—Presumption of right from long enjoyment—Injunction.*

Through an opening at the north-western corner of a tank water flowed in, and by another opening at the south-eastern corner water flowed out, into two channels. The plaintiff and his predecessors in title used from time immemorial the water of the tank through these openings and channels for irrigating their lands. *Held*, that a presumption arose that this enjoyment had an origin, conferring a right to the use of the water—*Rameswar Persad Narain Sing v. Koonj Behary Pattuk*, I. L. R. 4

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Calc. 633, relied upon; and that the plaintiffs were entitled to an injunction restraining the defendant from closing up either of the openings. <i>Arkwright v. Gell</i> , 5 M. & W. 203, <i>Birmingham, Dudley and District Banking Co. v. Ross</i> , L. R. 38 Ch. D. 296, <i>Wood v. Waud</i> , 3 Exch. 748, <i>Burrows v. Lang</i> , L. R. 2 Ch. 502, <i>Greater v. Hayward</i> , 8 Exch. 291, <i>Kisto Mohun Mukerjee v. Juggurnath Roy Joogee</i> , 11 W. R. 236, and <i>Toolsee Dass Kobearaj v. Bhyrub Lall Tewaree</i> , 8 W. R. 311, referred to. <i>MADHUB DASS BAIKAGI v. JOGESH CHUNDER SARKAR</i> , I. L. R. 30 Calc. ...	281
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<b>Embankment, addition to—"Shall add to"—Bengal Embankment Act (Bengal II of 1882) ss. 76, cl. (a), 79.</b>	
The words "shall add to any existing embankments" in s. 76 cl. (a) of Bengal Act II of 1882, include an addition to the height of an embankment. <i>Goverdhun Sinha v. The Queen-Empress</i> , I. L. R. 11 Calc. 570, overruled. <i>AJODHYA NATH KOILA v. RAJ KRISTO BEAR</i> , I. L. R. 30 Calc. ...	481
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————, by Misrepresentation. See LEASE, CONSTRUCTION OF ...	883
<b>Evidence—Order unsupported by evidence—Criminal Procedure Code (Act V of 1898) s. 147.</b>	
In proceedings under s. 147 of the Criminal Procedure Code, the first party filed their written statement and Magistrate having declined to give the second party time to file their written statement, made an order under that section in favour of the first party without recording any evidence. Held, that the Magistrate ought to have had some	

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evidence in proof of the allegations contained in the written statement; and that there being no such evidence upon which the order could be supported, it should be set aside. <i>Haro Mohan Sardar v. Gobind Bahu</i> , 7 C. W. N. 351, distinguished. <i>MAHOMED NUR v. BIKKAN MAHTON</i> , I. L. R. 30 Calc. ...	918
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————. Relevant fact—Evidence Act (X of 1872) s. 10—Conspiracy, evidence of—Statements by an alleged conspirator to a third party, relevancy of.	
Statements made by an alleged conspirator to a third party suggesting that there had been a conspiracy between the plaintiff and others in connection with the forgery of an alleged will are not relevant when such statements are used to prove (a) the existence of a conspiracy as to which there is no issue, or (b) that the plaintiff was a party to it. <i>KADAMBINI DASSI v. KUMUDINI DASSI</i> , I. L. R. 30 CALC. ...	983
————. Road-cess Returns—Returns made under s. 95, Bengal Cess Act (Bengal Act LX of 1880)—Admissibility in Evidence—Grounds of Enhancement of rent—"Fair and equitable rates"—Presumption against person not producing evidence which he can produce—Evidence Act (I of 1872) s. 114 (g).	
In a suit for enhancement of the rent of a taluqdari tenure road-cess returns rendered under s. 95 of the Bengal Cess Act (Bengal Act IX of 1880), though not conclusive, were held to be admissible in evidence as a basis on which to ascertain the assets of the taluq, and so fix a fair and equitable limit of enhancement. When such returns, produced by the plaintiff, showed that the taluqdars were receiving from their sub-tenants a considerably higher rent relatively than that which they were paying to their superior landlords, and that the claim for enhancement could <i>prima facie</i> be supported on the	

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ground that the existing rate was consequently not "fair and equitable" within the meaning of the Bengal Tenancy Act, they were held sufficient to shift the onus to the defendants to rebut the presumption so raised against them. To rebut such presumption the defendants might have produced their collection papers, but did not do so.—*Held*, that the Court was justified in acting on the presumption under s. 114 (g) of the Evidence Act (I of 1872). *HEM CHANDRA CHOWDHURY v. KALI PRASANNA BHADURI*, I. L. R. 30 Calc. ... .. 1033

— — — — —. *Secret trust—Will—Un-registered agreement—Registration Act (III of 1879) s. 17, sub-ss. (b), (h)—Non-testamentary document—Admissibility of Evidence.*

A party setting up a secret trust must adduce evidence to prove that it was communicated by the testator to the universal legatee, and that the legatee agreed to accept the property bequeathed on the terms of the trust. *Jones v. Badley*, L. R. 3 (h. A. C. 1862, referred to. In proceedings for obtaining letters of administration, the parties having settled their disputes presented a petition to the Court to the following effect:—"That I, Gyanoda Sundari Dassi, will get a 10-anna share of all the moveable and immoveable properties left by Kristomoni, deceased, and I, Ishwar Chander Sarkar, will get the remaining 6-anna share." "Be it explicitly expressed that after taking out the letters of administration I, Gyanoda Sundari Dassi, shall amicably take 10 anna share, and I, Ishwar Chander Sarkar, shall take 6-anna share of the moveable and immoveable properties after dividing the shares by demarcation." No order was made on this petition. The properties were of the value of over hundred rupees. *Held*, that the petition, unless registered, would be inadmissible in evidence. *Pranal Anni v. Lakshmi Anni*, I. L. R. 22 Mad.

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608; L. R. 26 I. A. 101, referred to, *KALI CHARAN GHOSAL v. RAM CHANDRA MANDAL*, I. L. R. 30 Calc. ... .. 783

— — — — —. *Thakbust and survey maps—Act IX of 1847, ss. 3, 5 and 6 Permanent Settlement of 1793—Liability of lands to assessment—Onus of proof—Suit for wrongful assessment.*

Maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they are made. They are not conclusive, and may be shown to be wrong; but in the absence of evidence to the contrary, they may be judicially received in evidence as correct when made. *Sateouri Ghosh Mandal v. Secretary of State for India*, I. L. R. 22 Calc. 262, *Syama Sunderi Dassya v. Jogobundhu Sootar*, I. L. R. 16 Calc. 186, *Sarat Sundari Dabi v. Secretary of State for India*, I. L. R. 11 Calc. 784, *Dewan Ram Jewan Singh v. Collector of Shahabad*, 14 B. L. R. 221 (note), and *Ram Jewan Singh v. Collector of Shahabad*, 19 W. R. 127, referred to. In every case the question what lands are included in the Permanent Settlement of 1793 is a question of fact and not of law. The onus of proving that the Government revenue fixed in 1793 is assessed on any particular lands as being included in the Permanent Settlement is on those who affirm that such is the case. Assuming lands not to be within the Permanent Settlement of 1793, the last survey made under s. 3 of Act IX of 1847 is to be taken as the starting point for deciding when the next survey is made, whether lands are within ss. 5 and 6 of that Act. But when the question is whether lands shown on a particular thak or survey map made since 1793 were or were not

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included in the lands charged with the assessment permanently fixed in 1793, the last thak or survey map cannot in all cases be acted upon or treated as decisive in the absence of evidence to the contrary. In this case, in which the plaintiff sued the Government for wrongful assessment of lands which he alleged to be part of his permanently-settled estate the survey maps were held not to be sufficient to shift the onus on to the defendant. <i>JAGADINDRA NATH ROY v. SECRETARY OF STATE FOR INDIA</i> , I. L. R. 30 Calc. ...	291
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A Small Cause Court has no authority to attach the salary of a railway servant that has not yet fallen due by a prohibitory order issued under s. 268 of the Code of Civil Procedure to the officer whose duty it is to disburse the salary, when the disbursing office is situate outside the jurisdiction of the Court. The decree must be sent for execution to the Court within the local limits of which the disbursing office is situate. A disbursing officer, who has so far submitted to such a prohibitory order as to recover and keep in deposit with him the portion of the salary attached, is not bound to pay the money into the Court which attached it without jurisdiction. <i>Hossain Ally v. Ashotosh Gangooly</i> , 3 C. L. R. 30, and <i>Parbati Charan v. Panchnand</i> , I. L. R. 6 All. 242, followed; <i>In re J. Hollick</i> , 3 B. L. R. (A.C.) 108; 10 W. R. 447, explained. <i>ABDUL GAFUR v. W. J. ALBYN</i> , I. L. R. 30 Calc. ...	713

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**cedure Code (Act XIV of 1882)**  
**ss. 234, 372—Decree for money—**  
**Limited Company, debts and**  
**liabilities of—Transfer of the pro-**  
**perties of the Company to a third**  
**party—Dissolution of Limited Com-**  
**pany—Legal representative.**

A obtained a decree for money against a certain limited Company. The Company had sold all their properties to a third person who again sold his rights to another limited Company. On an application for execution of the decree against the latter Company, substituting them on the record as the legal representatives of the former Company on their dissolution:—*Held*, that the decree could not be enforced against the latter Company, ss. 234 and 372 of the Code of Civil Procedure not being applicable to the present case. *HARIAN CHANDRA TEWARY v. CHANDFERN COMPANY, LIMITED*, I. L. R. 30 Calc. ... 961



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*Decree declared void as against one of the parties, Effect of—Fraudulent decrees.*

A brought a suit for partition against B and C, and obtained a decree by consent, based upon the award of certain arbitrators. C subsequently brought a suit for a declaration that the award and the decree were fraudulent and void as against her. The suit was decreed in her favour. On an application for the execution of the decree by A against B, objection was taken by the latter on the ground that, inasmuch as the decree was declared to be fraudulent and void as against C, it was not susceptible of execution:—*Held*, that as the decree was declared fraudulent and void as against C only, it was a subsisting decree between A and B and was susceptible of execution. *Bhimaji Govind Kulkarni v. Rakmabai*, I. L. R. 10 Bom. 398, and *Natesa Ayyar v. Annasami Ayyar*, I. L. R. 25 Mad. 426, referred to. *PASUPATI NATH BOSE v. NANDO LAL BOSE*, I. L. R. 30 Calc. ... 718

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*Sale for arrears of rent—Bengal Rent Act (Bengal Act VIII of 1869) ss. 59, 60, 64—Decree for arrears of rent against Hindu heiress—Rent accrued due after death of full owner—What passes by sale, whether limited or absolute estate.*

In execution of a decree for arrears of rent obtained in a suit under the Bengal Rent Act (Bengal Act VIII of 1869) by some only of several co-sharer landlords against a Hindu daughter for arrears accruing after her father's death, an under-tenure of which she was in possession and in enjoyment of the rents and profits was sold under the provisions of s. 64 of the Act: *Held*, by the Judicial Committee (affirming the judgment of the High Court) that only the limited interest which she took as her father's daughter, and not an

**Execution of Decree—concluded.**

absolute interest in the estate passed by the sale. The liability for rent ought to be regarded as her personal liability, and ought not to be held as attaching to the reversion unless the landlords proceeded to bring the tenure to sale under the special provisions of the Rent Law. *JIBAN KRISHNA ROY v. BROJO LAL SEN*, I. L. R. 30 CALC. 560

*Security bond—Mortgage—Sale of mortgaged property—Civil Procedure Code (Act XIV of 1882) s. 545—Transfer of Property Act (IV of 1882) s. 57 and s. 99.*

The relationship between a decree-holder and a judgment-debtor who has executed a security bond under s. 545, cl. (c) of the Civil Procedure Code, mortgaging certain properties for the due performance of the decree or order that may ultimately be passed by the appellate court is not that of mortgagee and mortgagor; and in the event of the appeal being dismissed, the decree-holder is entitled to realize his decretal money by sale of the properties given in security without instituting a suit under s. 67 of the Transfer of Property Act. *SHYAM SUNDAR LAL v. BAJPAI JAINARAYAN*, I. L. R. 30 Calc. ... 1060

**Execution of Decree, Application for.** *See* LIMITATION ... 761

**Execution Proceedings.** *See* CIVIL PROCEDURE CODE (Act XIV of 1882, ss. 244, 311) ... 142

**Executor *de son tort*.** *See* REPRESENTATIVE OF DECEASED PERSON ... 1044

**Executor, Liability of.** *See* CREDITOR, RIGHT OF SUIT BY ... 937

**Executors.** *See* ORIGINAL JURISDICTION ... 369

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**Extrinsic evidence, admissibility of.** *See* LEASE, CONSTRUCTION OF ... 883

**False charge.** *See* COMPLAINT 415, 923

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False imprisonment, suit for— Limitation—Limitation Act (XV of 1877), Sch. II, Art. 19—"Imprisonment"—Release on bail—Period from which limitation runs. To support an action for false imprisonment nothing short of actual detention and complete loss of freedom is sufficient. <i>Bird v. Jones</i> , 7 Q. B. 742, followed. A person is not under imprisonment after his release on bail. Limitation therefore runs from the date of such release, and a suit for false imprisonment is barred (under Art. 19 of Sch. II of the Limitation Act) unless brought within one year from that date. <i>MAHAMMAD YUSUFUDDIN v. SECRETARY OF STATE FOR INDIA</i> , I. L. R. 30 Calc. ... 872		Foreign Territory. See PRACTICE ... 934	
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Foreign Company not registered under Indian Companies Act of 1882. See FOREIGN CORPORATION, SUIT BY ... 103		Forgery. See CHARGES, MISJOINDER OF 822	
Foreign Corporation, suit by— Foreign Company not registered under the Indian Companies Act of 1882—Plaint, verification of by the Manager of an unregistered Company—Civil Procedure Code (Act XIV of 1882) ss. 430, 435—Indian Companies Act (VI of 1882) ss. 6, 41, 224. A foreign Corporation is entitled to sue in its corporate character in this country without being registered under the Indian Companies Act of 1882, or an Act of Parliament; and a plaint in such a suit can be verified on behalf of the Corporation by one of its principal officers, under s. 435 of the Code of Civil Procedure. A Corporation duly created according to the law of one State may sue and be sued in its corporate name in the Courts of other States. <i>Campbell v. Jackson</i> , I. L. R. 12 Calc. 41, and <i>Yusuff Beg v. The Board of Foreign Missions of the Presbyterian Church of New York</i> , I. L. R. 16 All., 420, distinguished. <i>SINGER MANUFACTURING Co. v. BAJNATH</i> , I. L. R. 30 Calc. ... 103		Fraud. See CIVIL PROCEDURE CODE (ACT XIV OF 1882) ss. 244, 311 ... 142 —See DOCUMENT, EXECUTION OF ... 43 —See ORIGINAL JURISDICTION ... 360	
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		Guardian—Guardian ad litem—Civil Procedure Code (Act XIV of 1882) ss. 443, 578—Absence of formal order appointing guardian—Sanction of appointment by Court—Irregularity—Service of summons on minors, defect in—Substantial representation of minors in suit. Under s. 443 of the Civil Procedure Code (Act XIV of 1882) the Court is bound, after satisfying itself of the fact of minority, to appoint a proper person to act on behalf of a minor in the conduct of a suit; and this rule should be strictly followed. But where the Court by its action has given its sanction to the appearance of a person as such a guardian, the absence of a formal order of appointment is not necessarily fatal to the proceedings. The mother of certain minor defendants appeared throughout the proceedings in a suit as their guardian; the Court	

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admitted the plaint in which she was described as guardian, and in the decree and execution proceedings the Court so described her:— <i>Held</i> that, although no formal order appointing her guardian <i>ad litem</i> was drawn up, the minors were effectively represented in the suit by their mother, and with the sanction of the Court. The absence of a formal order appointing the mother guardian <i>ad litem</i> , and the fact that no attempt was made to serve the minors (members of a joint family) or their mother personally with a summons before serving it on the only adult male member and the manager of the joint family were held, under the circumstances, there being nothing to suggest that the interests of the minors were not duly protected and the defects in procedure not having prejudiced them, to be merely irregularities under s. 578 of the Code of Civil Procedure and not errors fatal to the suit. <i>Suresh Chunder Wum Chowdhry v. Jugut Chunder Deb</i> , I. L. R. 14 Calc. 204 and <i>Hari Saran Moitra v. Bhudamswari Devi</i> , I. L. R. 15 Calc. 40; I. L. R. 16, I. A. 196, referred to. <i>WALIAN v. BANKE BEHARI PERSEAD SINGH</i> , I. L. R. 30 Calc. ... 1021	
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	High Court, power of, to review orders passed by Presidency Small Cause Court without jurisdiction. <i>See</i> JURISDICTION... 588
	Hindu Law—Adoption—Power of widow to give a son in adoption— Authority to give in adoption. According to Hindu law, a widow, even in the absence of any author- ity from her deceased husband, is competent to give one of her sons in adoption. <i>Sri Balusu Gurus- lingaswami v. Sri Balusu Rama Lakshamma</i> , I. L. R. 22 Mad. 398, L. R. 26 I. A. 113, <i>Mhalsabai v. Vithoba Khandappa Gulve</i> , 7 Bom. H. C. Appx. 26, <i>Hurosoondres Dosses v. Chundermoney Dosses</i> , Sev. Rep. 938, and <i>Tarini Charan Chow- dhry v. Saroda Sundary Dassi</i> , 3 B. L. R. (A. C.) 145, 11 W. R. 468, referred to. <i>Kangubai v. Bha- girthibai</i> , I. L. R. 2. Bom. 377, distinguished. <i>JOGESH CHANDRA BANERJEE v. NRITYAKALI DEBI</i> , I. L. R. 3 Calc. ... 965
	—Adoption, validity of—Son of a Brahmo, adoption of—Onus of proof—Incapacity—Brahmo Samaj —Evidence taken on Commission, reference to—Practices. The fact of adoption being admit- ted and its validity impugned on the ground of incapacity on the part of the adopted son, it is for the party so impugning the vali- dity of the adoption to establish the alleged incapacity. No ques- tion as to custom or usage being raised in the pleadings, the adop- tion must be determined by refer- ence to the principles of Hindu law. Evidence taken on commis- sion until tendered and admitted as evidence in the suit cannot be made use of by either party. <i>Nis- tarini Dassee v. Nundo Lall Bose</i> , 3 C. W. N. 239 (notes), dissented from. Inasmuch as a Hindu hav- ing renounced Hinduism is entitled to revert to Hinduism according to the rites of that religion, it follows that his infant son can with his con- sent and approval also revert in the same manner. Where an or- thodox Hindu adopted an infant son of a member of the Sadharan

## Hindu Law—continued.

Brahmo Samaj: *Held*, that in the absence of proof of special custom, such adoption was valid under the Hindu law. *Shamsing v. Santabai*, I. L. R. 26 Bom. 551, followed. *KUSUM KUMARI ROY v. SATYA RANJAN DAS*, I. L. R. 30 Calc. ... 999

—*Joint-family—Evidence of Separation—Conduct of parties as showing intention—Decree in litigation between members creating partition—Decree ascertaining shares of individual members.*

Where it was found (1) that the result of former litigation had been to ascertain the shares of individuals of a Hindu family, and that, although there had been, from the nature of the property, no partition by metes and bounds, there was undoubtedly a numerical division, by which the share of each member was fixed, and (2) that petitions by the various members under the Land Registration Act of 1876 clearly indicated individual and not joint ownership under the final decree in the litigation: *Held*, looking at the conduct of the parties, in order to arrive at their intention as to separation, and at the whole circumstances of the case, that, notwithstanding the imperfect form of the decree, a separation of the joint family was established. *RAM PERSHAD SINGH v. LAKHPATI KOBE*, I. L. R. 30 Calc. ... 231

—*Partition—Requisites for Partition—Deed defining and allotting shares—Effect on deed of subsequent conduct of the parties—Effect of deed as regards minor members of the joint family—Re-union of member after once separating himself.*

An ikarnama executed by the members of a joint family, some of whom were minors, stated in unambiguous terms that defined shares in the whole joint property had been allotted to the several co-parceners, and also gave liberty to any of the parties to it "either to live together as a member of the joint family as before or to separate his own business:" *Held*,

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that the effect of the deed was to cause a separation in estate and interest between all the co-parceners. The clause giving the parties the option of being joint or separate was not inconsistent with a separation in estate. It conferred on the parties no larger liberty of choice than they would have had without it. They might elect either to have a partition of their shares by metes and bounds, or to continue to live together and enjoy their property in common as before. Whether they did one or the other would affect the mode of enjoyment, but not the tenure of the property or their interest in it, which was on the principle of the case of *Appovier v. Rama Subba Aiyar*, 11 Mad. I. A. 75, determined by the allotment to them of defined shares by the ikarnama. The legal effect of the ikarnama could not be controlled or altered by evidence of the subsequent conduct of the parties; but such conduct in this case was not inconsistent with an intention to subject the whole property to a division of interest, although it was not immediately to be perfected by an actual partition. *Held*, also, that the ikarnama was binding on the minors. It followed from the admitted right of any co-parcener to claim partition that a valid agreement for partition could be made during the minority of one or more of the co-parceners. If it was unfair or prejudicial to their interests, the minors could, by proper proceedings on attaining majority, set it aside so far as it concerned themselves. *Quere*: whether in Bengal a member of a joint family once separated can re-unite only (according to the text of Vrihaspati quoted in the mitakshara, Ch. II, s. 9) with a father, brother, or paternal uncle. *BALKISHEN DAS v. RAM NARAIN SAHU*, I. L. R. 30 Calc. ... 738

—*Partition—Transactions amounting to partition or separation—Re-union—Agreement to re-unite—Minor—Presumption when*

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one co-parcener separates himself—  
Agreement to remain united—*Mitakshara Law*.

According to the text of Vrihaspati (*Mitakshara* Ch. II, s. 9), a re-union in estate properly so-called can only take place between persons who were parties to the original partition. Semble: An agreement to re-unite cannot be made on behalf of a person during his minority. There is no presumption when one co-parcener separates from the others that the latter remain united. Where it is necessary, in order to ascertain the share of the out-going co-parcener, to fix the shares which the others are, or would be, entitled to, the separation of one may be said to be the virtual separation of all. And an agreement amongst the remaining co-parceners to remain united or to re-unite must be proved like any other fact. In this case, in which the appellant claimed to be entitled, on the death of his uncle in 1882, to the property of a joint family by right of survivorship, one of the members had admittedly separated himself in 1869, and no agreement by the other members to remain united or to re-unite had been proved, and upon the circumstances of, and evidence in, the suit, it was held by the Judicial Committee that the appellant had not sufficiently established the state of jointness between himself and his uncle, which was necessary to make his claim successful; and that even had it been established, transactions in 1889 settled with the appellant's knowledge and consent amounted to a division amongst the members of the family which would defeat his claim. *BALABUX v. RUKHMABAI*, I. L. R. 80 Calc. ... 725

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A bequest to an idol not in existence at the time of the testator's death

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## Hindu Law—concluded.

is void. Unchastity does not debar a Hindu woman from inheriting the *stridhan* property of her female relatives. *Ganga Jati v. Gharita*, I. L. R. 1 All. 46, followed. *Ram-nath Tolapatro v. Durga Sundari Debi*, I. L. R. 4 Calc. 560, *Ramananda v. Raikishori Barmani*, I. L. R. 22 Calc. 347, distinguished. Under the Bengal School of Hindu law, inheritance depends on consanguinity so far as the near relatives are concerned, but in the case of remoter relations the law falls back on the principle of spiritual benefit. *NOGENDRA-NANDINI DASSEN v. BENGY KRISHNA DEB*, I. L. R. 30 Calc. ... 521

Hindu Widow, lease granted by.  
*See LEASE* ... 990

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Indian Companies Act (VI of 1882) ss. 6, 41, 224. *See FOREIGN CORPORATION, SUIT BY* ... 103

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Indian Railways Act (IX of 1890) s. 72— <i>Risk Note, Form B—Indian Contract Act (IX of 1872) ss. 151, 152, 161—Railway Company—Goods, loss of—Bailee—Suit for compensation.</i>	
A special agreement, known as "Risk Note, Form B," sanctioned by the Governor-General in Council under s. 72, cl. (2) of the Indian Railways Act, absolves a Railway Company from all liability for loss of goods from any cause whatsoever. The Company in such a case is not a bailee under the Indian Contract Act. <i>TOONYA RAM v. EAST INDIAN RAILWAY COMPANY, I. L. R. 30 Calc.</i> ...	257
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Insolvency— <i>Civil Procedure Code (Act XIV of 1882), s. 357—Debt not included in the Schedule—Insolvent debtor, discharge of—Right of creditor not in the Schedule against the discharged insolvent's property—Limitation Act (XV of 1877), Schedule II, Articles 178, 179.</i>	
A creditor whose debt has not been included in the scheduled debts within the meaning of s. 357 of the Code of Civil Procedure is entitled to proceed with execution of his decree against the insolvent's property, notwithstanding his discharge. <i>Haro Prita Dabia v. Shama Charan Sen, I. L. R. 16 Calc 592, and Sheoraj Singh v. Gauri Sahai, I. L. R. 21 All. 227</i> , referred to. On an application for execution of a decree having been made by the decree-holder, the salary of the judgment-debtor was attached. The judgment-debtor having represented that, as all his property had vested in a	

# Insolvency—concluded.

Receiver, he having taken insolvency proceedings, the execution could not be carried on, the Court released from attachment the salary of the judgment-debtor which had been attached. Subsequently the insolvency proceedings came to an end by the discharge of the Receiver. Within three years from the final discharge, the decree-holder made another application asking the Court to revive his former application for execution. The judgment-debtor objected to the execution on the ground that it was barred by limitation. *Held*, that the case was governed by article 178, Schedule II of the Limitation Act, and that the present application was one in continuation of the previous application, and it having been made within three years from the time when the decree-holder became entitled to ask the Court to revive his former application by reason of the insolvency proceedings having been brought to an end by the discharge of the Receiver, was not barred by limitation. Where a decree directed that the "plaintiff shall not be able to take out execution of decree until the disposal of petition for insolvency made by the defendants before the District Judge of Patna" and the application for execution not made until after three years from the date of the order of the first Court in the insolvency proceedings: *Held*, that the limitation applicable to the execution of such decree was that provided for by article 178, Schedule II of the Limitation Act (XV of 1877), and that the application for execution was barred by limitation, it not having been made within three years from the date of the order of the first Court under s. 351 of the Civil Procedure Code, granting the petition for insolvency, when the right to make the application first accrued. *Muhammad Islam v. Muhammad Ahsan, I. L. R. 16 All. 237*, referred to. *ASHRAFUDDIN AHMED v. BISPIN BHARI MULLICK, I. L. R. 30 Calc. ...* 407

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Interest— <i>Agreement to pay interest—Evidence, admissibility of—Promissory note—Civil Procedure Code (Act XIV of 1882), Chapter XXXIX, s. 532.</i>	
In a suit instituted under Chapter XXXIX of the Civil Procedure Code (Act XIV of 1882) the plaintiff is not entitled to recover any interest unless such interest is specified in the promissory note itself, or to give evidence regarding any agreement to pay interest. <i>Remfry v. Shillingsford</i> , I. L. R. 1 Calo. 130, referred to. <i>BHUPATI RAM v. SOURENDRA MOHUN TAGORE</i> , I. L. R. 30 Calo. 446	
<i>Meane profits, interest on—Civil Procedure Code (Act XIV of 1882) s. 211.</i>	
Regard being had to the provisions of s. 211 of the Civil Procedure Code (Act XIV of 1882) in the ascertainment of meane profits due to the decree-holder, he is entitled to receive interest, year by year, on the amount found to be due. <i>Hurro Durga Chowdhurani v. Surut Sundari Debi</i> , I. L. R. 8 Calo. 332; I. L. R. 9 I. A. 1, distinguished. <i>RADHARAMAN MUNSHI v. SUNBOMOYI DEBI</i> , I. L. R. 30 Calo. ... 508	
<i>Mortgage bond—Penalty—Increased rate of interest from date of default—Contract Act (IX of 1872) s. 74—Act VI of 1899 s. 4.</i>	
A stipulation in a bond for increased interest from the date of default may be a stipulation by way of penalty, and the Courts in this country are competent to grant equitable relief against such stipulations independently of s. 74 of the Contract Act. <i>ABDUL GANI v. NANDLAL</i> , I. L. R. 30 Calo. ... 15	
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Jurisdiction— <i>Attachment of "crops" cut and stored—"Crops or other produce of land," meaning of—Criminal Procedure Code (Act V of 1898) ss. 145 and 146.</i>	
The words "crops or other produce of land" in sub-s. (2) of s. 145 of the Criminal Procedure Code mean crops or other produce of land attached to the land. A Magistrate therefore has no jurisdiction under s. 146 of the Code to attach crops which have been severed from the land and stored. <i>RAMZAN ALI v. JANARDHAN SINGH</i> , I. L. R. 30 Calo. ... 110	
<i>Criminal Procedure Code (Act V of 1898) ss. 107, 145—Proceedings under s. 145 of the Code, initiation of—Security for keeping the peace.</i>	
The making of a formal order under sub-section (1) of s. 145 of the Criminal Procedure Code is absolutely necessary to give the Magistrate jurisdiction to initiate proceedings under that section. Where a notice was issued on the parties under s. 107 of the Criminal Procedure Code to show cause why they should not execute a bond to keep the peace; and the Magistrate at the hearing recorded an order wherein he stated that it appeared to him that, on the facts, the case was one for the application of s. 145 of the Code and not of s. 107, and he then proceeded to "bind down" the first party under sub-section (6) of s. 145. <i>Held</i> , that the expression "bind down" was not correct, and that the order was entirely bad. <i>SUKRU DOSADH v. RAM PRAGASH SINGH</i> , I. L. R. 30 Calo. ... 443	

**Jurisdiction—Criminal Procedure Code (Act V of 1898) s. 145—Magistrate's power of to stay proceedings and cancel order passed by him under sub-s. (1), s. 145—Revision—High Court, interference by.**

A Magistrate has jurisdiction to cancel an order passed under sub-s. (1) of s. 145 of the Criminal Procedure Code and to stay proceedings if he becomes satisfied, whatever the source of information may be, that the state of things does not exist, which alone would give jurisdiction to proceed with the inquiry. Where therefore a Magistrate, having instituted proceedings and passed an order under sub-s. (1) of s. 145, received information, which he believed, that there no longer existed a dispute likely to cause a breach of the peace, and before any written statement had been filed by either side, cancelled his order and stayed the proceedings. *Held*, that the High Court could not interfere, as the Magistrate had not acted without jurisdiction. *Tarini Charan Chowdhry v. Amulya Ratan Roy*, I. L. R. 20 Calo. 867, referred to; *Harbulla Nath Narain Singh v. Luchmeswar Prasad Singh*, I. L. R. 26 Calo. 188, distinguished. *MAHINDRA CHANDRA NANDI v. BARADA KANTA CHOWDHRY*, I. L. R. 80 Calo. ... 112

—**Criminal Procedure Code (Act V of 1898) ss. 145, 355, 356—Witness, attendance of—Process, refusal to issue—Magistrate, discretion of—High Court, power of interference by—Charter Act (24 and 25 Vict. C. 104) s. 15—Proceedings under Chapter XII of the Criminal Procedure Code.**

Where the refusal by a Magistrate to assist one of the parties to a proceeding under Chapter XII of the Criminal Procedure Code in procuring the attendance of his witnesses deprived that party of a hearing on the only question for the determination of the Court and so amounted to a denial of justice: *Held*, that the Magistrate in

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refusing process acted without jurisdiction. *Madhab Chandra Tanti v. Martin*, I. L. R. 30 Calo. 508 (note) referred to. The High Court in the exercise of general powers of supervision vested under 24 and 25 Vict., c. 104, s. 15, has power to interfere in a case like this, even if it cannot, in strictness, be said that the Magistrate acted without jurisdiction. A mere refusal, however, to summon or examine a particular witness or witnesses cited by a party, in proceedings under Chapter XII of the Criminal Procedure Code, is not necessarily a ground for interference by the High Court. It cannot be laid down as a rule of law that proceedings under Chapter XII of the Criminal Procedure Code should be regarded, as to procedure, as summons cases. *Harendra Narain Singh Chowdhry v. Babani Prasad Baruani*, I. L. R. 11 Calo. 762, and *Ram Chandra Das v. Monohur Roy*, I. L. R. 21 Calo. 29, explained. *SURJYA KANTA ACHARJEE v. HEM CHUNDER CHOWDHRY*, I. L. R. 30 Calo. ... 508

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—**High Court, power of, to review orders passed without jurisdiction in the Presidency Small Cause Court—Bench consisting of the Chief Justice and another Judge—Charter Act (24 & 25 Vict. c. 104) ss. 14, 15—Registrar, Presidency Small Cause Court, jurisdiction of—Ex-parte decree for default—Civil Procedure Code (Act XIV of 1882) s. 622—Rules 63, 70, 92, 94 (framed by the High Court) under s. 9 of the Presidency Small Cause Courts Act (1) of 1895).**

By virtue of the power conferred under s. 14 of the Charter Act (24 and 25 Vict. c. 104) the Chief Justice, by constituting a Division Court consisting of himself and any other Judge of the High Court can deal with applications against an order made by the Presidency Small Cause



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Court. <i>Shamsher Mundul v. Ganendra Narain Mitter</i> , I. L. R. 29 Calc. 498. The Registrar of the Presidency Small Cause Court has no jurisdiction to entertain an application for new trial to set aside an <i>ex-parte</i> decree made by him for default. <i>HALADHAR MAITI v. CHOYTONNO MAITI</i> , I. L. R. 30 Calc. ...	588

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*Munsiff, jurisdiction of—rent, suit for—Bengal Tenancy Act (VIII of 1885) s. 144—Civil Procedure Code (Act XIV of 1883) ss. 15 and 17—Civil Courts Act (XII of 1887) s. 19—Cause of action—Pecuniary limitation—Second appeal.*

Section 144 of the Bengal Tenancy Act is controlled by ss. 15 and 17 of the Civil Procedure Code; a suit for rent is therefore to be instituted, subject to pecuniary limitations, in the Court of the lowest grade competent to try it. *FAZLUR RAHIM ABU AHMED v. DWARAKA NATH CHOWDHRY*, I. L. R. 30 Calc. ...

“Parties concerned in such dispute,” meaning of—Addition of parties during proceedings, effect of—Fresh proceedings, if necessary—Omission to add necessary parties—Dispute as to separate plots of land—Separate proceedings, if necessary—Criminal Procedure Code (Act V of 1898) s. 145.

Proceedings under s. 145 of the Criminal Procedure Code are not without jurisdiction because the Magistrate on information before him has made parties thereto only those actually in dispute and likely to cause a breach of the peace, although during such proceedings it is brought to his notice that another party is interested in the subject-matter of the dispute, nor is the Magistrate bound to stay such proceedings. The words “parties concerned in such dispute” are intended to indicate all persons claiming to be in possession at the

# Jurisdiction—continued.

time of the initial orders under cl. (1), s. 145 of the Code. A claim merely to a right to possession, as distinguished from a claim to be in possession, would be outside the scope of the inquiry. Where there has been an addition of a party after the initiation of the proceedings, there is no necessity for fresh proceedings in consequence, if the party added was concerned originally in the dispute, which is the foundation of the proceedings. Up to the time the inquiry begins parties may be added. If they are added after, it is an irregularity, but it is not necessary to initiate fresh proceedings, though evidence previously taken ought, if the parties added require it, to be again taken in their presence. Proceedings under s. 145 are not without jurisdiction, because some person claiming possession in some way of the lands or a portion of the lands in dispute has not been made a party, he not being one of the parties in the dispute likely to cause a breach of the peace, so far as appeared to the Magistrate, such person not having appeared and raised any objection. Proceedings under s. 145 are not without jurisdiction because some of the parties are concerned only with possession of a portion of the lands in dispute. *Protap Narain Singh v. Rajendra Narain Singh*, I. L. R. 24 Calc. 55, declared obsolete. *KRISHNA KAMINI v. ABDUL JUBBAR*, I. L. R. 30 Calc. ...

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*Sanction to prosecute—Criminal Procedure Code (Act V of 1898) s. 195, sub-ss. (6) and (7)—Subordinate authority—Sonthal Parganas Justice Regulation (V of 1893) s. 15.*

For the purposes of s. 195 of the Code of Criminal Procedure, the Court of the Deputy Commissioner of Sonthal Parganas shall be deemed to be subordinate to the

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Court of the Commissioner of Bhagalpur. Accordingly, an application against an order of the Deputy Commissioner of Sonthal Fargana, revoking a sanction given by the Subordinate Judge of Godda under s. 195 of the Code of Criminal Procedure, should be made to the Commissioner of Bhagalpur, and not to the High Court.	
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When a case is once made over for disposal to a Subordinate Magistrate by the District Magistrate, the latter is not competent to pass any order relating to it other than an order such as might be made by him under Chapter XXXII of the Code of Criminal Procedure. <i>Moul Singh v. Mahabir Singh</i> , 4 C.W.N. 242, and <i>Golapdy Sheikh v. Queen-Empress</i> , I. L. R. 27 Calc. 979, referred to. RADHABULLAV ROY v. BENODE BEHARI CHATTERJEE, I. L. R. 30 Calc. ...	449
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S. 424 of the Civil Procedure Code relates to the institution of a suit against the Secretary of State. There is nothing in the law to show that in case of any amendment necessitated by alleged discovery of facts previously unknown to the plaintiff, the Secretary of State should have a further notice of two months. No notice of action is required against the Sub-Collector, who is joined in the action with the Secretary of State, inasmuch as he is not sued for any act done by him independently of the Government. The jurisdiction of the Land Acquisition Collector extends under the Act over several districts, and he has power to hold his sittings at the office to which he was posted. When provisions of law are clear, it is not competent to Courts of Justice to enter into questions of natural justice, and, having regard to the economic and social conditions of the country, the provision that the Government should be the sole judge of what is likely to prove useful to the public is both expedient and useful. In making an acquisition the wishes of the owner of the land are wholly irrelevant under the Act. There is no definition of a "public purpose" in the Land Acquisition Act, nor any limitation regarding what is likely to prove useful to the public: both matters are left to the absolute discretion of the Local Government, and it is not competent for this Court to assume to itself the jurisdiction to impose restrictions on this discretion by holding that at an enquiry under s. 40 of the Act, the person whose land is intended to be acquired should have an opportunity to appear and object. This is a	

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—concluded.	
course wholly contrary to the policy of the Act. S. 40 of the Act constitutes the Government custodian of the public interests and sole judge as to whether the land is required for the construction of work, and whether that work will prove useful to the public. This Court is not competent to question the validity of the proceedings under s. 40 of the Act. It is not open to this Court to discuss the sufficiency of the enquiry made by the Collector or his qualifications. The Local Government is sole judge. S. 41 of the Land Acquisition Act makes the Government sole judge of the manner in which the public are to have the use of the land taken up. A Collector holding an enquiry under the Land Acquisition Act is not a judicial officer, nor is the proceeding before him a judicial proceeding. He acts as the agent of the Government for the purpose of acquisition, clothed with certain powers to require the attendance of persons to make statements relevant to the matters which he has to enquire into. <i>Durga Das Bakhit v. Queen-Empress</i> , I. L. R. 27 Calc. 820, followed. Neither the enquiry nor the proceedings held by the Land Acquisition Collector are invalid. There is no provision under s. 39 of the Act that the consent of Government should be given after the agreement is executed, and that such consent should be notified by a resolution in the Gazette. <i>Kzra v. THE SECRETARY OF STATE</i> , I. L. R. 30 Calc. ... 36	
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The Land Registration Act (Bengal Act VII of 1876) provides for the registration by proprietors or mortgagees of their shares in an estate, but does not make it incumbent upon them to register their shares in specific mauzas or other portions of land within the estate. <i>Parashmoni Dasi v. Nabokishore Lahiri</i> , I. L. R. 30 Calc. 773, followed. <i>DROKI SINGH v. LAKSHMAN ROY</i> , I. L. R. 30 Calc. ... 880	
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<b>Land Registration—Land Registration Act (Bengal Act VII of 1876) ss. 42, 78—Co-sharer's interest by amicable settlement—Registration of proprietor's share—Partition Act (Bengal Act V of 1897) s. 12.</b>	
The Land Registration Act [VII (B.C.) of 1876] requires the registration by the various proprietors of their shares in the estates only, and does not seem to contemplate a registration of shares in separate mauzas in the estates. The provisions of s. 42 of the Act have therefore no application to the case of a co-sharer who, by an amicable arrangement between the co-sharers, has been placed in possession of a larger share than his registered share in some mauzas and of a less share or no share in others, so long as the total interest which he holds in all the mauzas represents his registered interest in the whole estate. <i>PARASHMONI DASSI v. NOBOKISHORE LAHIRI</i> , I. L. R. 30 Calc. ... 773	
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**Lease—Limitation—Hindu widow, lease granted by—Suit by reversioners for khas possession—Limitation Act (XV of 1877) ss. 91, 118, 125 and 141.**

A lease granted by a Hindu widow is on her death only voidable and not of itself void: *Modhu Sudan Singh v. Rooke*, I. L. R. 25 Calc. 1; L. R. 24 I. A. 164, followed. *Sadai Naik v. Serai Naik*, I. L. R. 28 Calc. 532, referred to. On the death of a Hindu widow a suit by a reversioner to recover possession of immoveable property by setting aside a lease executed by her is governed by Art. 91, and not by Art. 141 of Sch. II of the Limitation Act (XV of 1877). *Jagadamba Chaudhrani v. Dakhina Mohan Roy Chaudhry*, I. L. R. 13 Calc. 308; L. R. 13 I. A. 84. *Malkarjun v. Narhari*, I. L. R. 25 Bom. 337, L. R. 27 I. A. 214. *Mohesh Narain Munshi v. Taruck Nath Moitra*, I. L. R. 20 Calc. 487; L. R. 20 I. A. 30. *Shrinivash Murar v. Hanmant Chavda Deshapande*, I. L. R. 24 Bom. 260. *Janki Kunwar v. Ajit Singh*, I. L. R. 15 Calc. 58; L. R. 14 I. A. 142. *Mahabir Pershad Singh v. Hurrikur Pershad Narain Singh*, I. L. R. 19 Calc. 629, and *Chunder Nath Bose v. Ram Nidhi Pal*, 6 C. W. N. 863, referred to. *Shoo Shankar Gir v. Ram Shewak Chowdhri*, I. L. R. 24 Calc. 77, distinguished. *BIJOY GOPAL MUKERJI v. NIL RATAN MUKERJI*, I. L. R. 30 Calc. ... 990

**—Renewal of lease—Offer by lessor to renew lease without stating terms, effect of—Arbitration—Award—Valuation—Civil Procedure Code (Act XIV of 1882) s. 525.**

In an agreement to lease there was a proviso to the following effect:—"At the expiration of the period of the lease, in the event of a new lease not being given, the said lessor shall be at liberty to resume direct possession of the land demised, and to take over all the buildings then standing thereon at a valuation arrived at by three arbitrators":—*Held*,

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that the mere offer on the part of the lessor to grant a new lease without any terms being mentioned could not operate as the giving of such lease within the meaning of the document. *Held*, further, that if there was no matter in difference between the parties which could be referred to arbitration, the valuation made by three persons appointed by the plaintiff was not an award within the meaning of s. 525 of the Civil Procedure Code, and it could not therefore be filed in Court. *Collins v. Collins*, 26 Beav. 306; *Leeds v. Burroughs*, 12 East 1, referred to; *In re Carus-Wilson and Greene*, L. R. 18 Q. B. D. 7; *Chooney Money Dassie v. Ram Kinkur Dutt*, I. L. R. 28 Calc. 155, followed. *MACNAGHTEN v. RAMESWAR SINGH*, I. L. R. 30 Calc. ... 831

**Lease, construction of—"Istemrari mukurari," meaning of—Conduct and intention of parties—Local custom—Extrinsic evidence, admissibility of—Estoppel by misrepresentation—Recognition of succession to tenancy—Relevant fact—Evidence Act (I of 1872), s. 11, cl. 3.**

The words *mukurari istemrari* in a lease do not primarily imply any heritable character in the grant, as the term *mowrari* does. They imply permanency, from which, in a secondary sense, such heritable character might be inferred, it being always doubtful whether they mean permanent during the life-time of the grantee or permanent as regards hereditary character. The words do not *per se* convey an estate of inheritance, but such an estate can be created without the addition of any other words, the circumstances under which the lease was granted and the subsequent conduct of the parties being capable of shewing the intention with sufficient certainty to enable the Court to hold that the grant was perpetual. The rule is perfectly general and is not subject to the qualification that it is by local custom the meaning of

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the terms is restricted. *Lilamand Singh v. Munorunjun Singh*, 13 B. L. R. 124; L. R. 11 I. A. Sup. vol. 181; *Tulshi Pershad Singh v. Ramnarain Singh*, I. L. R. 12 Calc. 117; L. R. 12 I. A. 205, and *Agin Bindh Upadhyay v. Mohan Bikram Shah*, I. L. R. 30 Calc. 20, relied upon. In such a case, no extrinsic evidence as to any assurances given by the grantor of the lease that it was intended to last for ever, is admissible, although the grantor may possibly be estopped from questioning the permanent character of the lease by reason of misrepresentation even on a point of law which is not clear and free from doubt. *Balkishen Das v. Legge*, I. L. R. 22 All. 149; L. R. 27 I. A. 58 referred to. When the question is whether one of a large number of leases granted by a landlord at about the same time under similar circumstances and on similar terms, was intended to be a perpetual one, facts relating to acts and conduct of parties indicative of such intention are relevant facts only if they relate to a fairly large number of the leases, and not otherwise. But the fact that rents were received from the successor of the grantees in several instances, the names of the deceased grantees being retained in the rent receipts in which the successors, who were not recognised as *mokurari-istamraridars*, were merely described as *marfatdars*, is not relevant and cannot be taken as indicative of any such intention. *Croft v. Lamley*, 6 H. L. O. 673 and *Kali Krishna Tagore v. Fuzle Ali Chowdhry*, I. L. R. 9 Calc. 848, distinguished. NARISINGH DYAL SAHU v. RAM NARAIN SINGH, I. L. R. 30 Calc. ... 883

## "Lease of Land"—*Revenue Sale Law (Act XI of 1859) s. 37, cl. 4—"Permanent building."*

The word "lease" in sub-s. 4 of s. 37 of Act XI of 1859 does not mean a lease from the zemindar only. *KIRON CHUNDER ROY v. NAIMUDDI TALUKDAR*, I. L. R. 30 Calc. ... 498

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Leave to appeal to Privy Council—*Letters Patent, 1865, cl. 39—Order "made on appeal."*—*Amendment of decree, application for—Civil Procedure Code (Act XIV of 1882), ss. 206, 595 and 596.*

An order passed by the High Court, rejecting an application under s. 206 of the Civil Procedure Code to amend a certain decree of the Court, is not an order "made on appeal," and is therefore not appealable to His Majesty in Council. *Soudamoney Dossee v. Maharaj Dheraj Mahatab Chand Bahadoor*, 6 W. R. (Misc. R.) 103, and *Rajah Enast Hossein v. Rance Roushun Jahan*, 10 W. R. (F. B.) 1, referred to. SUNDER KORE v. CHANDISHWAR PRASAD SINGH, I. L. R. 30 Calc. ... 679

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—*Limitation Act (XV of 1877) ss. 4, 5, 12, and Sch. II, Art. 170—"Appeal"—Leave to appeal in forma pauperis.*

The word "appeal" in s. 5 of the Limitation Act (XV of 1877) does not include an application for leave to appeal in *forma pauperis*. *Lakshmi v. Ananta Shanbaga*, I. L. R. 2 Mad. 230; and *Parbati v. Bhola*, I. L. R. 13 All. 79, referred to. SARAT CHANDRA DEY v. BROJESHWARI DASGI, I. L. R. 30 Calc. ... 790

**Limitation—Limitation Act (XV of 1877), s. 19, Exp. 1, Sch. II, Art. 56—Acknowledgment of debt, unstamped—Stamp Act (I of 1879), Sch. I, Art. 1—Tankha—Stamp-duty—Evidence of debt.**

The mere fact of a document being an acknowledgment of a debt within the meaning of s. 19 of the Limitation Act, would not make it liable to a stamp-duty under Sch. I, Art. 1 of Act I of 1879. There are other conditions required to be fulfilled, one of which being that it should be intended to supply evidence of a debt. *Binja Ram v. Rajmohun Roy*, I. L. R. 8 Calc. 282, *Bishambar Nath v. Nand Kishore*, I. L. R. 15 All. 56, and *Mulji Lala v. Linga Makaji*, I. L. R. 21 Bom. 201, referred to. *AMBICA DAT Vyas v. NITYANUND SINGH*, I. L. R. 30 Calc. ... 687

**—Limitation Act (XV of 1877), Sch. II, Art. 29—Suit for money wrongly taken out in execution—Regulation VIII of 1819—Patni Taluk.**

A suit to recover the surplus proceeds of sale held under Regulation VIII of 1819, wrongfully taken out by the defendant in execution of a decree against a third party, does not come under Art. 29, Sch. II, of the Limitation Act. *Jagjivan Javherdas v. Gulam Jilani Chaudhri*, I. L. R. 8 Bom. 17, dissented from. *LAKSHMI PRIYA CHOWDHURANI v. RAMA KANTA SHAHA*, I. L. R. 30 Calc. ... 440

**—Mortgage—Execution of decree, application for Limitation Act (XV of 1877) s. 4, Sch. II, Art. 179, Exp. I—Step in aid of execution—Mortgage decree—Subsequent mortgage—Pleading limitation in appeal—Application to postpone sale—Opposition to application of judgment-debtor.**

In an application for execution of a mortgage decree by a prior mortgagee, a subsequent mortgagee as a judgment-debtor is competent to plead limitation either in the first Court or in appeal. Article 179, Schedule II,

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of the Limitation Act, applies to an application for execution of a mortgage decree. The time from which limitation runs under cl. 4 of Art 179 of the Limitation Act is the date of applying, and not the date on which the application is disposed of. *Fakir Muhammad v. Ghulam Husain*, I. L. R. 1 All. 580; *Sarat Kumary Dassi v. Jagat Chandra Roy*, 1 C W. N. 260, followed. An application by the decree-holder to postpone a sale not with a view to enable him to bring the property to sale more advantageously for him, but upon other grounds, is not an application to take some step in aid of execution. *Abdul Hossain v. Fasilun*, I. L. R. 30 Calc. 255, followed. The decree-holder's opposition to an application of the judgment-debtor to sell the properties in an order different from that in which they have already been directed to be sold is not an application to take some step in aid of execution. *Dharanamma v. Subba*, I. L. R. 7 Mad. 906, distinguished. *TROYLOKYA NATH BOSE v. JOYOTI PROKASH NANDI*, I. L. R. 30 Calc. ... 761

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**—Registration—Suit to enforce registration—Limitation Act (XV of 1877) ss. 6, 14—Period of Limitation, computation of—Registration Act (III of 1877) s. 77.**

An executant of a document not admitting execution, the Sub-Registrar refused to register it. There was an appeal to the Registrar, who also refused to register. Within thirty days of the dismissal of the appeal, an application for review was filed to the Registrar, which was also dismissed. On a suit brought in the Civil Court to enforce the registration of the document, after the dismissal of the said application for review: *Held*, that s. 14 of the Limitation Act had no application to the

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present case; and that the suit not having been brought within thirty days from the date of the dismissal of the appeal by the Registrar, it was barred by limitation. <i>Nogendra Nath Mullick v. Muthura Mohun Parhi</i> , I. L. R. 18 Calc. 368, followed in principle; <i>Veeramma v. Abbiah</i> , I. L. R. 18 Mad. 99; <i>Girija Nath Roy v. Patani Bibee</i> , I. L. R. 17 Calc. 263, referred to; and <i>Khetter Mohun Chuckerbutty v. Dinabashy Shaha</i> , I. L. R. 10 Cal. 265, discussed. <i>ABDUL HAKIM v. LATIFUNNESSA KHATUN</i> , I. L. R. 30 Calc. ...	582
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<b>Lunatic—Management of lunatic's estate—Custody of lunatic's person—Lunacy Act (XXXV of 1858) ss. 7, 9.</b>	
Under s. 9 of the Lunacy Act (XXXV of 1858) it is incumbent upon a District Judge to appoint a manager of the estate of a person adjudged to be of unsound mind. If a lunatic be well taken care of by his own people at home he should not be forced to go to a lunatic asylum, there being apparently no provision in the Lunacy Act authorizing a District Judge to send such a person to the asylum. <i>JAGA KORE, In re</i> , I. L. R. 30 Calc. ...	973
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<b>Mahomedan Law—Inheritance—Default of sharers—Illegitimacy—"Return"—Sunni Sect—Bequest to an heir without consent of other heirs.</b>	
According to Mahomedan Law in default of other sharers by blood and distant kindred, property left by a man or woman returns to the widow or to the husband. <i>Mahomed Arshad Chowdhry v. Sajida Banoo</i> , I. L. R. 9 Calc. 702, followed. Among the Sunni sect illegitimacy is no bar to a person inheriting from his mother and his maternal relations. <i>Sahabzades Begum v. Mirza Hummat Bahadoor</i> , 12 W. R. 512, considered; <i>Koonari Bibi v. Dalim Bibi</i> , I. L. R. 11 Calc. 14, followed. Under the Mahomedan Law, a bequest to an heir is invalid without the consent of the other heirs. <i>BAFATUN v. BILAITI KHANUM</i> , I. L. R. 30 Calc. ...	683

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**Mahomedan Law—Wakf, validity of—Family settlement in perpetuity—Illusory gifts for charitable purposes.**

“A wakfnama to be valid must be a substantial dedication of property to a religious or charitable purpose.” Where it appeared from the wakfnama itself that the substantial object of it was not to devote the settled property to charitable or religious purposes, but, in effect, to give the property in substance to the grantor’s family practically in perpetuity, and that the provisions for charitable purposes could scarcely be regarded as other than illusory: *Held*, that the instrument did not create a valid wakf, according to Mahomedan law. *Mahomed Ahsanulla Chowdhry v. Amar Chand Kundu*, I. L. R. 17 Calc. 498; I. B. 17 I. A. 28, *Abdul Gafur v. Nizamuddin*, I. L. R. 17 Bom. 1; I. B. 16 I. A. 170. *Abul Fata Mahomed Ishak v. Rasmaya Dhur Chowdhry*, I. L. R. 22 Calc. 619; I. B. 22 I. A. 76, and *Mujibunnissa v. Abdur Rahim*, I. L. R. 23 All. 293; I. B. 28 I. A. 16, referred to. *Fazlur Rahim Abu Ahmed v. Mahomed Obedul Azim Abu Ahsan*, I. L. R. 30 Calc. 666

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assessment of.—

**Landlord and tenant, combined position of—Costs.**

Where the position of the plaintiff is that of landlord and tenant combined, and the defendant, a sub-tenant, notwithstanding a notice served upon him under s. 167 of the Bengal Tenancy Act, withheld possession from the plaintiff, the mesne profits must be assessed on the value of the crops raised by

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 the defendant, and not upon the  
 basis of the rent which the rightful  
 owner had been realising from the  
 tenants, before dispossession.  
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 be false by person to whom it is  
 made—Evidence Act (I of 1872) s.  
 115—Age, false representation as  
 to—Contract by infants—Contract  
 Act (IX of 1872) ss. 11, 19, 64, 65—  
 Mortgage by minor—Persons com-  
 petent to contract—Void contract—  
 Advances on mortgage declared  
 invalid, repayment of.*

Section 115 of the Evidence Act  
 (I of 1872) does not apply to a case  
 where the statement relied upon is  
 made to a person who knows the  
 real facts and is not misled by the  
 untrue statement. There can be  
 no estoppel where the truth of the  
 matter is known to both parties.  
 A false representation made to a  
 person who knows it to be false is  
 not such a fraud as to take away  
 the privilege of infancy. *Nelson v.*  
*Stocker*, 4 De G. & J. 458,  
 followed. On the true construction  
 of the Contract Act (IX of 1872) a  
 person, who by reason of infancy is  
 incompetent to contract, cannot  
 make a contract within the mean-  
 ing of the Act. A mortgage, there-  
 fore, made by a minor is void; and  
 a money-lender who has advanced  
 money to a minor on the security  
 of the mortgage is not entitled to  
 repayment of the money on a  
 decree being made declaring the  
 mortgage invalid; sections 64 and  
 65 of the Contract Act being based  
 on there being a contract between  
 competent parties, and being in-  
 applicable to a case where there is  
 not, and could not have been, any  
 contract at all. *Thurstan v. Not-  
 tingham Permanent Benefit Build-  
 ing Society* (1902 1 Ch. 1, 1903 A.



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C. 6), followed. <i>MOHORI BIBEE v. DHARMODAS GHOSE</i> , I. L. R. 30 Cal. ...	539
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——. <i>Sale of Mortgaged property—Money-decree—Transfer of Property Act (IV of 1882), ss. 67, 99—Execution—Purchase by the mortgagee, effect of—Mortgagee, liabilities of—Account.</i>	
A mortgagee, in execution of a decree obtained against the mortgagor on account of another debt, sold the mortgaged properties, purchased the equity of redemption himself, and obtained possession through the Court. And in a subsequent suit upon the mortgage for sale of the mortgaged properties, the defence, <i>inter alia</i> , was that the proceedings were contrary to the provisions of s. 99 of the Transfer of Property Act, that the purchase by the plaintiff was null and void, and that the mortgagee was bound to account for the period he was in possession of the mortgaged property. <i>Held</i> , that, having regard to the provisions of s. 99 of the Transfer of Property Act, the purchase by the mortgagee was null	

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<b>Mortgage—continued.</b>	
and void, and possession obtained by him was not in accordance with law, and he was therefore liable to render account of moneys realized from the mortgaged properties during the term of his possession. <i>Durgayya v. Anantha</i> , I. L. R. 14 Mad. 74, followed, and <i>Sri Raja Papamma Rao v. Sri Vira Protapa Ramachandra Basse</i> , I. L. R. 19 Mad. 249, and L. R. 28 I. A. 82, referred to. <i>SHIB DASS DASS v. KALI KUMAR ROY</i> , I. L. R. 30 Cal. ...	463
——. <i>Suit by puisne mortgagee</i>	
——. <i>Right of sale by puisne mortgagee</i>	
——. <i>Decree on first mortgage to which puisne mortgagee was not a party—Transfer of Property Act (IV of 1882), s. 85—Civil Procedure Code (Act XIV of 1882), s. 287—Indian Registration Act (III of 1877), s. 17.</i>	
A puisne mortgagee is entitled to a sale of the property secured by his mortgage subject to the right of the first mortgagee, even after the property has been sold in execution of a decree obtained by the first mortgagee, in a suit to which the puisne mortgagee was not a party. <i>Durga Churn Mukhopadhyaya v. Chundra Nath Gupta Chowdhry</i> , 4 C. W. N. 541, overruled. <i>DEBENDRA NARAIN ROY v. RAMTARAN BANERJEE</i> , I. L. R. 30 Cal. ...	599
——. <i>Transfer of Property Act (IV of 1882), s. 85—Non-joinder—Apportionment of mortgage debt—purchaser of mortgaged property—Release.</i>	
When a purchaser from the mortgagor of one of the mortgaged properties (subsequently released by the mortgagee from his lien) is not made a party to a mortgage suit brought by the mortgagee, the proper course is not to dismiss the suit for non-joinder, but to apportion the mortgage debt between the property so purchased and released and the other mortgaged property. In such a case the mortgage should be treated as split up into two. <i>HARI KISSEN BHAGAT v. VELIAT HOSSEIN</i> , I. L. R. 30 Cal. ...	755

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<b>Mortgage—Transfer of Property Act</b> (IV of 1882), ss. 96, 97—Civil Pro- cedure Code (Act XIV of 1882), s. 295, prov. (c)—Sale-proceeds, sur- plus of—Prior mortgage—Contract Act (IX of 1872), s. 44—Contrib- ution as between co-mortgagors— Interest to date of realisation, rate of.		<b>Nawab of Tank—Succession to estate</b> of Punjab ruling Chiefs—Custom— Impartible estate—Primogeniture— Estate appurtenant to Nawabship of Tank—Grant of village by Nawab as maintenance—Cash allowance granted by Government— Effect of Government settlement.	
If a mortgagor receives any money out of the surplus sale-pro- ceeds of a share in the property mortgaged to him, sold in execution of a decree on a prior mortgage from some of the mortgagors to whom the share belonged and against whom the decree was obtained, he is bound to apply the money to the satisfaction of his mortgage debt only in case he receives it by virtue of his secu- rity and not otherwise, although the payment might be made to him by the said mortgagors in satisfaction of other debts due to him from them. <i>Johnson v. Borneo</i> , 3 Y. & C. Ch. 268, followed. The Court is quite competent to allow in a mortgage decree interest at the stipulated rate up to the actual date of realisation. <i>Rameswar Koor v.</i> <i>Mahomed Mahdi Hossein Khan</i> , I. L. R. 26 Calc. 39; L. R. 25 I. A. 179, and <i>Maharaja of Bhartpur v.</i> <i>Rani Kanno Dei</i> , I. L. R. 23 All. 181; L. R. 28 I. A. 35, followed. GANGA RAM MARWARI v. JAI- BALLAV NARAIN SINGH, I. L. R. 30 Calc. ... .. 963		The country known as Tank proper belonged to the Chief for the time being who was both ruler and proprietor. Succession in the family devolved upon the eldest son of the Chief, the other members of his family being entitled to mainten- ance only.	
— bond. See INTEREST ... 15		When the settlement of the coun- try was made after the introduction of the British Rule in 1849 the claim of Nawaz Khan, the then Nawab of Tank, was in 1854 admitted to seven villages in the pargana of Tank: <i>Held</i> , that the effect of this settlement was not to create a fresh estate subject to the ordinary law of inheritance, but to continue to the Chief for the time being, as it were <i>jure coronæ</i> , the proprietor- ship of the villages which had been founded by his ancestors and the succession to which had theretofore been regulated by the custom of the family. This view is confirmed by what took place in 1875 when the Government conferred upon Nawaz Khan as an hereditary jagir a cash allowance of Rs. 25,000 per annum, together with the land revenue of the seven villages, and in sanction- ing the grant made no change in the position in which the Nawab already stood in regard to the pro- prietorship of these villages as distinguished from their liability to payment of Government revenue.	
— decree. See LIMITATION 761		Another village had been granted by Nawaz Khan to the defendant, his second son, for his maintenance. In 1882 the Government sanctioned the appointment of the plaintiff, the grandson of Nawaz Khan, to be Nawab of Tank, and also to the entire jagir and cash assignment enjoyed by the late Nawab subject to a deduction of Rs. 5,000 for the maintenance of the defendant. <i>Held</i> , as to the seven villages, that they appertained to the Nawabship	
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and the plaintiff was entitled to recover the half share which had been recorded in the defendant's name. As to the other village the defendant was entitled to it, and could retain it and the cash allowance without being put to the election which he would take; that allowance and the assignment of the village coming from different sources and being independent of each other. <i>MAHAMMAD AFZAL KHAN v. GHULAM KASIM KHAN</i> , I. L. R. 30 Calc. ...	843
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<b>New Trial.</b> See TRIAL BY JURY ...	485
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<b>Notice—Bengal Tenancy Act (VIII of 1885), s. 155.—Ejectment, Suit for—Alternative relief—Limitation.</b>	
A suit for the ejectment of a tenant for misuse of the land was dismissed by the Court below on the ground that the notice served on the tenant under s. 155 of the Bengal Tenancy Act was bad, as the compensation claimed in the notice for the misuse was demanded in the alternative: <i>Held</i> , that the notice was not bad in law merely because the compensation was demanded in the alternative. <i>Pershad Singh v. Ram Pertab Roy</i> , I. L. R. 22 Calc. 77, distinguished. <i>BOIDYA NATH PANDAY v. GHISU MANDAL</i> , I. L. R. 30 Calc. ...	1063
—Land Acquisition Act (X of 1870), ss. 9, 16, 40—Persons known or believed to be interested—Power to take possession—Vesting of land absolutely in Government.	
Land acquired under the provisions of Act X of 1870 vests absolutely in the Government, free from all encumbrances, after a <i>bond fide</i> award or reference by the Collector has been made and possession taken, even when no special notice, as required by s. 9 of the Act, has been served on persons known or	

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believed to be interested therein. <i>North London Railway Company v. Metropolitan Board of Works</i> , 28 L. J. Ch. 909 and <i>Galloway v. Mayor and Commonalty of London</i> , L. R. 1. H. L. 84, referred to. <i>GANGA RAM MARWARI v. SECRETARY OF STATE FOR INDIA</i> , I. L. R. 30 Calc. ...	576
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—of Appeal—Indian Companies Act (VI of 1882) ss. 169 and 214—Appeal out of time.	
No appeal against an order made in the matter of the winding up of a Company under the Indian Companies Act of 1882 shall be heard by an Appellate Court unless notice of the same is given within three weeks after any order complained of has been made. <i>In re Estates Investment Company</i> , L. R., 8 Eq. C. 227, not followed. <i>PROBANNA RUMAR GUHA v. BANI KANTA BHATTACHARJEE</i> , I. L. R. 30 Calc. ...	753
—of dishonour—Negotiable Instruments Act (XXVI of 1881), ss. 30, 93, 96—Hundi—Liability of drawer.	
In order to make the drawer of a <i>hundi</i> liable in case of dishonour by the drawee or acceptor thereof, it is necessary for the plaintiff to show that due notice of dishonour was given to the drawer, or that he (the drawer) did not suffer any damage for want of such a notice. <i>Krishnashet Bin Ganshet Shetys v. Hari Valji Bhatye</i> , I. L. R. 20 Bom. 488, and <i>Moti Lal v. Moti Lal</i> , I. L. R. 6 All. 78, referred to. <i>AMIRUDDI BEPARI v. BAHADOOR KHAN</i> , I. L. R. 30 Calc. ...	977
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———— for security for keeping the peace on conviction— Appeal—Appellate Court, power of, to set aside such order—Criminal Procedure Code (Act V of 1898), ss. 106 and 423, cl. (d). Held, that an order in appeal setting aside an order of the first Court made under s. 106 of the Code of Criminal Procedure is an incidental order within the meaning of s. 423, cl. (d) of the Code and can be made by an Appellate Court. ABDUL WAHED v. AMIRAN BIBI, I. L. R. 30 Calc. ...	101
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Original jurisdiction—concluded. 881, referred to. Where property was by will vested in executors in trust to pay legacies, allowances, debts, and the residue of the income of one-third of the testator's estate to his widow for life, and a suit was brought by her for the administration of her share in the estate and for a declaration that certain leases granted by the executors to themselves could not stand as against her, the beneficiary: Held, that such a suit is not a suit for land, and that s. 10 of the Limitation Act applied. <i>Saroda Pershad Chattopadhyaya v. Brojo Nath Bhattacharjee</i> , I. L. R. 5 Calc. 910, distinguished <i>Hurro Coomares Dossee v. Tarini Churn Bysack</i> , I. L. R. 8 Calc. 766, referred to. The testator in his will made use of the following expression with reference to the expenses for the <i>Pujaks</i> , etc.—“You (i.e., the executors) are to pay my share of the expenses whatever that may be:” Held, that the testator did not intend thereby to give the executors (they being the parties to decide what those expenses should be) such an absolute discretion in the matter as might deprive the beneficiary under the will of any beneficial interest in the estate. <i>Mullick v. Mullick</i> , 1 Knapp 245, referred to. <i>NISTARINI DASSI v. NUNDO LAL BOSE</i> , I. L. R. 30 Calc. ...	309
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<i>Mistake—Limitation—Power of Receiver to sue—Limitation Act (XV of 1877), s. 19—Acknowledgment of liability.</i> By an order of the Court the plaintiff was appointed Receiver in a certain suit with authority to sue for and recover an attached debt. Through some mistake in the office of the attorneys of the plaintiff in that suit, the money sought to be attached was wrongly described in the tabular statement as money due under the agreement of the 25th October 1895, whereas it should have been the agreement of the 26th August 1895, and the Court, acting on this representation made the order, which applied to the alleged agreement of the 26th October 1895. On application to amend the order and the plaint, or in the alternative to read the existing order as if it were in reality applicable to the right agreement: <i>Held</i> , that no order for amending the plaint or the order could be made; the amendment of the order would operate only as a new order, taking effect from the	

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date on which it is made, and could not therefore operate as the basis or authority for the present suit. The plaintiff's authority to maintain this suit depends solely upon the order appointing him receiver: if it has been made under any mistake it cannot, by any course of construction, be regarded as applying to anything other than the subject-matter specified by the order itself, the intention of the parties being immaterial. <i>Way v. Heorn</i> , 13 C. B. (N. S.) 292, distinguished. In order to satisfy the requirements of s. 19 of the Limitation Act, though a promise to pay need not be made out, it is necessary when the right claimed is a debt that an unequivocal and unqualified admission of the debt or a part of it or of the subsisting relationship of debtor and creditor should be established. There is a distinction in this respect between the law of limitation applicable in England and that in force in this country. <i>Fink v. Buldeo Dass</i> , I. L. R. 26 Calc. 716, distinguished; <i>Vankata v. Parthasaradhi</i> , I. L. R. 16 Mad. 220, approved of. <i>Quære</i> : Whether, having regard to the terms of s. 60 of the Code of Civil Procedure, a plaintiff can be allowed to take advantage of any ground of exemption from the ordinary law of limitation which has not been pleaded in the plaint. <i>Benode Behari Mookerjee v. Raj Narain Mitter</i> , I. L. R. 30 Calc. 699	
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<b>Practice—Evidence on commission—Oaths Act (X of 1873), s. 13—Foreign Territory—Civil Procedure Code (Act XIV of 1882), ss. 387—399.</b>	
A commission was issued by the High Court to take the evidence of a witness in Chandernagore (French territory) under s. 387 of the Civil Procedure Code, and the provisions of the Code, so far as they applied, were complied with: <i>Held</i> , that the commission was rightly issued and executed under ss. 387 and 399 of the Code: <i>Held</i> , also, that an affirmation (as required by the commission) having been administered and the evidence duly recorded, the commission was correctly executed. <i>KADAMBINI DASSI v. KUMUDINI DASSI</i> , I. L. R. 30 Calc. 934	
<b>Examination of Witness on Commission. Prolonged and unnecessary Cross-examination.</b>	
Where the Court is satisfied that the cross-examination of any witness on commission is being unnecessarily prolonged, it will order such cross-examination to be concluded within a certain time. <i>SURAJ PRASAD v. STANDARD LIFE INSURANCE COMPANY</i> , I. L. R. 30 Calc. ... 626	
<b>Probate, application to recall—Citation—Proof of will—Genuineness of will.</b>	
On an application by a Hindu widow for an order that the probate obtained by her husband's brother of a will alleged to have been made by her husband be recalled, she not receiving any intimation of the application for probate; and that the will be proved in her presence: <i>Held</i> , that such an application ought to be granted, and that the probate of the will must be recalled and kept in the record until the case is decided. <i>ELOKESHI DASSI v. HARI PRASAD SOOR</i> , I. L. R. 30 Calc. ... 528	
<b>Revival of Suit—Substitution of Parties—Code of Civil Procedure (Act XIV of 1882), ss. 368, 373—"Pending Suit"—"Right to apply," accrual of—Limitation Act (XV of 1877), Sch. II, Art. 178.</b>	

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On directions to take an account in a suit, the suit is still 'pending' within the meaning of s. 372 of the Code of Civil Procedure until the final order on the taking of the account is made; and the right to apply in such a suit to have the death of a certain defendant recorded, and the names of his heirs substituted on the record, accrues from day to day and is not barred under Art. 178, Sch. II of the Limitation Act. The provisions of s. 368 of the Code do not apply to a case like this. <i>Gocool Chunder Gossamee v. The Administrator-General of Bengal</i> , I. L. R. 5 Cal. 726, <i>Kedar Nath Dutt v. Harra Chand Dutt</i> , I. L. R. 8 Cal. 420, and <i>Ram Nath Bhattacharjee v. Uma Charan Sircar</i> , 3 C. W. N. 756, relied upon. <i>SURENDRA KESHUB ROY v. KHETTER KRISHTO MITTAR</i> , I. L. R. 30 Cal. ... 609	Court suit. <i>ISSUE SINGH v. BERGMANN</i> , I. L. R. 30 Cal. ... 627
— <i>Stay of Proceedings in Small Cause Court—Transfer of suit on a Promissory Note—Suit for an account in the High Court—Procedure—Matter of convenience rather than of right—Costs.</i>	— <i>Vakil's right to audience on the Original Side of the High Court—Revisional Jurisdiction of the High Court over the Presidency Small Cause Court—Civil Procedure Code (Act XIV of 1882), s. 622.</i>
As a general rule, it would be no answer as regards a suit in the Small Cause Court upon a promissory note, for the defendant in that suit to say that the claim is a matter of account. But if subsequently a suit is instituted in the High Court by the defendant in the Small Cause Court suit in which all transactions between the parties can be dealt with, and if he gives security for the total amount of his indebtedness, then it is desirable that there should not be a separate proceeding in respect of the promissory note, though <i>prima facie</i> it does not constitute an item in a running account between the parties. The question of procedure becomes a matter of convenience rather than of right, and justice can be done between the parties by apportionment of costs after the account has been taken in the High	A vakil is not entitled to audience on the Original Side of the High Court. Applications for the exercise of the Court's revisional powers over the Presidency Small Cause Court are properly dealt with in the exercise of the Ordinary Original Civil Jurisdiction of the Court and should be made in the usual way by an advocate of the Court instructed by an attorney. <i>SARAT CHANDRA SINGH v. BROJO LAL MUKERJI</i> , I. L. R. 30 Cal. ... 986
	<b>Pre-emption—Punjab Laws Act (XII of 1878), ss. 10, 12—"Village Community"—Act IV of 1872, s. 14—Occupancy Tenants in zemindari village.</b>
	The expression "village community" in the Punjab Laws Act (XII of 1878) is not used to denote a village community of the typical sort consisting of members of one family or one clan holding the village lands in common, and dividing between them the agricultural lands according to the custom of the village; but is used to denote a body of persons bound together by the tie of residence in one and the same village, amenable to the village customs, and subject to the administrative control of the village officers. A "village community" is not confined to the landowners in the village. Occupancy tenants are members within the meaning of the Punjab Laws Act, and so are all persons in an inferior position who belong to the village, though they may be unconnected with the land and not entitled to any right of pre-emption under the Act. <i>RAHIMUDDIN v. REWAL</i> , I. L. R. 30 Cal. ... 685
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<b>Prescription—Beneficial enjoyment of the dominant owner—Cornices projected over another's land as ornamentation—Indian Easements Act (V of 1882).</b>	
There can be no prescriptive right to a projection which has been erected merely for the purpose of ornamentation. <i>John George Bagram v. Khettranath Karforma</i> , 3 B. L. R. (O. C.) 18, referred to. <i>NRITTA KUMARI DASSI v. PUDDOMONT BEWAH</i> , I. L. R. 30 Calc. ...	503
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<b>Presumption. See SALE ...</b>	1
— under s. 114 of the Evidence Act of 1872. See EVIDENCE ...	1083
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<b>Principal and Agent. See CONTRACT ...</b>	202
—, <i>Illegal cess</i>	
— <i>Khurcha—Liability of Agent to account for sums realized, not legally recoverable by Principal.</i>	
An agent is liable to account to his principal for the sums realized by him from tenants, although the said sums are not legally recoverable by the landlord as being illegal cesses. <i>Nobin Chunder Roy Chowdhry v. Gooroo Gobind Mojoomdar</i> , 25 W. R. 8, doubted; <i>Gobind Soonder Singh v. Chandi Charan Bhattacharjee</i> , unreported, followed. <i>NAGENDRABALA DASSI v. GURU DAYAL MUKERJI</i> , I. L. R. 30 Calc. ...	1011
—, <i>Tenant—Suit</i>	
— <i>Damages—Second appeal, ground of, erroneous view of evidence.</i>	
Because a person is the sole recorded tenant in the landlord's <i>sherista</i> he is not therefore alone entitled to sue third parties for damages done to the tenure, if other persons are also interested in and have a right to the same. An erroneous view of	

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<b>Principal and Agent—concluded.</b>	
evidence involves an error of law. A master or principal is liable for wrong done to third parties by his servant or agent, provided that the act is done on his behalf and with the intention of serving his purposes. <i>ISWAR CHUNDER SANTRA v. SATISH CHUNDER GIRI</i> , I. L. R. 30 Calc. ...	297
<b>Prior Mortgage. See MORTGAGE ...</b>	953
<b>Prisoner in Jail. See WRONGFUL CONFINEMENT ...</b>	95
<b>Privy Council, Practice of—Appeal—Delay—Mistake—Court—Orders—"Sufficient cause"—Limitation Act (XV of 1877), s. 5—Analogous appeal.</b>	
The appellant preferred two appeals from a decision of a Subordinate Judge, one of which, instead of presenting to the High Court, he had filed in the District Court, which on a true valuation of the appeal had no jurisdiction to hear. While the other, which was an analogous case raising the same question, he had correctly filed in the High Court. It appeared:—(a) that when the mistake was brought to the appellant's notice, great delay occurred in the taking of any steps by him to rectify it; (b) that the High Court had refused to admit the appeal out of time on the ground of such delay, and because the appellant had not satisfied them that he had made a <i>bona fide</i> mistake, nor that he had sufficient cause under s. 5 of the Limitation Act (XV of 1877) for not presenting the appeal in time; (c) that the High Court had transferred to their own files the appeal from the District Court, but on objection taken that they had no power to transfer a case that was not properly before the District Judge, they had dismissed the appeal; and (d) that the analogous appeal had been decided by the High Court in the appellant's favour. On appeal from the orders of the High Court in the wrongly-filed appeal which, it was contended, were under the circumstances erroneous: <i>Held</i> , by the Judicial	



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<b>Privy Council, practice of—<i>concl'd.</i></b>		<b>Process—<i>Process to compel attendance of witness, issue of—Refusal to compel attendance of such witness—Magistrate, discretionary power of—Summons case—Criminal Procedure Code (Act V of 1898), s. 244.</i></b>	
Committee that they could not interfere, unless they were satisfied that the refusal of the High Court to admit the appeal out of time was wrong, and they were not so satisfied; and that the delay which had occurred since the rejection of the appeal by the High Court and which was not accounted for, militated against any interference.		There is no discretionary power given in summons cases to a Magistrate by s. 244 of the Criminal Procedure Code to refuse to compel the attendance of a witness, upon whom the Court has already issued process. <i>DAULAT SINGH v. BRINDA BELDER</i> , I. L. R. 30 Calc. ...	121
<i>RAM NARAIN JOSHI v. PARMESWAR NARAIN MAHTA AND OTHERS</i> , I. L. R. 30 Calc. ...	309	— refusal to issue. <i>See</i>	
<i>Concurrent decision of facts—Courts basing decision on different grounds—One Court relying on oral, and the other on documentary, evidence.</i>		JURISDICTION ...	508
The rule of the Judicial Committee not to disturb a concurrent finding of fact by two Courts, unless it is clearly shown to be erroneous, is none the less applicable, although the Courts have not taken precisely the same view of the weight to be attached to each particular item of evidence. A case where one Court has relied on the oral, and the other on the documentary, evidence is within the rule. <i>RAM ANUGRA NARAIN SINGH v. CHOWDHRY HANUMAN SAHAL</i> , I. L. R. 30 Calc. ...	303	<b>Prohibitory Order. <i>See</i> EXECUTION OF DECREE</b> ...	713
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— and Administration Act (V of 1881), ss. 4, 12, 14, 15, 19, 33, 82, 187. <i>See</i> REPRESENTATIVE OF DECEASED PERSON ...	1044	<b>Property. <i>See</i> ORIGINAL JURISDICTION</b> ...	389
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<b>Proceedings under Ch. XII of the Criminal Procedure Code. <i>See</i> JURISDICTION</b> ...	58	<b>Publication. <i>See</i> DEFAMATION</b> ...	402
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— — — — — (Act V of 1898). <i>See</i> RECEIVER ...	593	— servant. <i>See</i> ARBITRATOR ...	1084
		— — — — — Obstruction—Distraint—Crops—Sanction—Unlawful assembly—Bengal Tenancy Act (VIII of 1885), ss. 123 and 126—Criminal Procedure Code (Act V of 1898), ss. 4 and 195—Penal Code (Act XLV of 1860), ss. 143 and 186.	
		A peon was ordered by the Civil Court under the provisions of the Bengal Tenancy Act to cut certain crops, which had already been distrained. The peon with some labourers cut a portion of the crops, when they were forcibly stopped by the petitioners and a mob of men. The peon lodged information of the occurrence at the thanah. The petitioners were convicted under ss. 143 and 186 of the Penal Code:	

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<i>Held</i> , that, as there was in this case no complaint as defined by s. 4 of the Criminal Procedure Code of the public servant concerned, the conviction under s. 186 of the Penal Code should be set aside. <i>KAILAS KURMI v. EMPEROR</i> , I. L. R. 30 Calc. ...	285
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— <i>Execution of decree—Civil Procedure Code (Act XIV of 1862), s. 295—Proportionate distribution of sale-proceeds—Decrees against the same judgment-debtor—Suit for refund of assets distributed.</i>	
B obtained a decree against three judgment-debtors—X, Y and Z. A obtained a decree against X and Y only: <i>Held</i> , that A is entitled, under the provisions of s. 295 of the Code of Civil Procedure, to a proportionate distribution of the assets realised by the sale of a property of X, Y and Z, so far as they represent the share of	

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<b>Rateable distribution—concluded.</b>	
his own judgment-debtors X and Y in that property. <i>Deboki Nandan Sen v. Hart</i> , I. L. R. 13 Calc. 294, overruled. <i>GONESH DAS BAGRIA v. SHIVA LAKSHMAN BHAKAT</i> , I. L. R. 30 Calc. ...	533
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Receiver— <i>Agreement to pay salary of Receiver—Position of Receiver—Civil Procedure Code (Act XIV of 1882), s. 603.</i>	
A promise to pay the salary of a Receiver without leave from the Court, even if unconditional, being in contravention of the law, is not binding on the promisor. A Receiver being an officer of the Court, the Court only is to determine his fees or remuneration; and the parties cannot by any act of theirs add to, or derogate from, the functions of the Court without its authority. <i>Manick Lall Seal v. Surrut Coomaree Dassees</i> , I. L. R. 22 Calc. 648, referred to. <i>PROKASH CHANDRA SARKAR v. R. E. ADLAM</i> , I. L. R. 30 Calc. ...	696
— <i>Party to Criminal Proceedings—Leave of Court—"Owner"—Calcutta Municipal Act (Bengal Act III of 1899), ss. 3, 320, 574.</i>	
A Receiver appointed by the High Court is not the "owner" of the property of which he has been appointed Receiver, within the meaning of s. 3, cl. 32, of Bengal Act III of 1899: nor can he be made a party to any suit or proceeding without the leave of the Court appointing him. <i>Dunne v. Kumar Chandra Kishore</i> , I. L. R. 30 Calc. 593; 7 C. W. N. 390, referred to. <i>W. R. FINK v. THE CORPORATION OF CALCUTTA</i> , I. L. R. 30 Calc. ...	721
— <i>Party—Jurisdiction—Proceedings under s. 145 of the Code of Criminal Procedure (Act V of 1898)—Possession of Receiver.</i>	
A Receiver appointed by the High Court cannot be made a party to a proceeding under s. 145 of the Code of Criminal Procedure merely in his capacity of Receiver, and a Magistrate has no jurisdiction to interfere with him in respect of	

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his possession of the estate, without the sanction of the Court, his possession being the possession of the Court. <i>Ex-parte Cochran</i> , L. R. 20 Eq. 282; <i>William Russell v. The East Anglian Railway Company</i> , 8 Mac. & G. 104, and <i>Ames v. The Trustees of the Birkenhead Docks</i> , 20 Beav. 332, referred to. <i>Semble</i> . The Receiver can neither sue nor be sued without the leave of the Court. <i>Miller v. Ram Ranjan Chakravarti</i> , I. L. R. 10 Calc. 1014, referred to. <i>A. M. DUNNE v. KUMAR CHANDRA KISHORE</i> , I. L. R. 30 Calc. ...	593
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Before the High Court can give an opinion upon a matter referred to it by the Presidency Small Cause Court under s. 69, three conditions must be complied with—(1) that the Court referring the matter entertains a reasonable doubt upon some question of law, (2) that it states what the point is upon which the doubt is entertained, and (3) that it gives a statement of the facts containing an expression of opinion on the point which is referred to the decision of the High Court. When such a course has not been adopted, the High Court can, under s. 621 of the Code of Civil Procedure, return the case to the Lower Court, for amendment. <i>GABLING v. SECRETARY OF STATE FOR INDIA</i> , I. L. R. 30 Calc. ...	453

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those cases in which the plea of the tenant is one in respect of which the burden of proof lies upon him; in other words, where it is a plea of confession and avoidance. The section does not, therefore, apply to a case where the rate of rent is in dispute. <i>BANARANI PERSHAD v. MAKHAN ROY, I. L. R. 30 Calo.</i>	... 947	<b>Res Judicata—Civil Procedure Code (Act XIV of 1882) s. 13—Bengal Tenancy Act (VIII of 1885) ss. 101 to 108, 117 to 119, 143, 153, 189—Record of Rights—Survey and measurement of lands—Rules—Jurisdiction—Revenue officer—Court—Landlord and tenant—Ejectment—Bengal Act VIII of 1869, ss. 38, 39—Bengal Act V of 1875.</b>	
<b>See RESUMPTION</b>	... 811	Sections 104-108 of the Bengal Tenancy Act (before the amendment of 1898) apply to proceedings taken under s. 103 in the same way as to proceedings taken under s. 101. On an application under s. 103, a Revenue officer is competent to make a survey and prepare a record of rights without any order of the Government under s. 101. When there is a total denial of relation of landlord and tenant by one of the parties, a Revenue officer has jurisdiction in a proceeding under s. 103 of the Bengal Tenancy Act to decide that question, but his decision, although it may have the force of a decree, cannot operate as <i>res judicata</i> in a subsequent suit in ejectment and for declaration of title brought in a Civil Court. <i>DHARANI KANTA LAHIRI v. GABER ALI KHAN, I. L. R. 30 Calo.</i>	... 339
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Pending the execution of a decree, the judgment-debtor died, leaving a will under which R. K. was the residuary legatee. She took possession of the estate, and applied for letters of administration, with the will annexed. The will was ultimately found to be true, and letters ordered to be granted. In the meantime, R. K. and the heir-at-law were substituted in place of the judgment-debtor in the execution proceedings, and an order was made between the parties in the matter of the execution. <i>Held</i> , that the order was a good and binding order: <i>Held</i> , further, that a residuary legatee in possession of the estate of a deceased judgment-debtor cannot be regarded as an executor <i>de son tort</i> , so that his acts would not be binding upon the legal representative. <i>Prosunno Chunder Bhattacharjee v. Kristo Chytunno Pal, I. L. R. 4 Calo. 342, Janaki v. Dhanu Lall, I. L. R. 14 Mad. 454, Chathakelan v. Govinda Karumiar, I. L. R. 17 Mad. 186, referred to. CHUMI LAL BOSE v. OSMOND BREX, I. L. R. 30 Calo.</i>	...1044	The decision in a suit by one of two semindars against the other as to the right to the profit rental of a bazar was held not to be <i>res judicata</i> in a subsequent suit for possession of a share of the bazar in which suit all the parties, plaintiffs and defendants, claimed under the plaintiff in the former suit. Such a plea, however, might well be a defence to a hostile claim by	
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persons asserting a title under the defendant-zemindar in the former suit against those claiming under the plaintiff-zemindar in that suit: *Held*, on the true construction of deeds of mortgage, and of sale, and a certificate of sale, of shares in a zemindari, where the documents contained no words of exception or reservation that they conveyed all the interests of the mortgagor, vendor, and judgment-debtor respectively in the zemindari. Their interests in the houses on the land and in the profit rents derived from them passed in the absence of any words showing an intention to retain or exclude them. *ASGHAR REZA KHAN v. MAHOMED MEHDI HOSSAIN KHAN*, I. L. R. 30 Calc. ... 556

**Restoration of property, Order for.** *See* **APPEAL** ... 690**Resumption—Rent suit for—Co-owner not joined as party—Land resumed by Government and resettled with heirs of former proprietor—Assessment with separate rent after resumption—Bengal Act VIII of 1879, s. 10—Suit for rent as fixed at settlement.**

A chuck forming part of a permanent *ganti* tenure, of which a pottah was granted in 1867 by the zemindar to the defendant at an annual rent of Rs. 2,300, was resumed by the Government, and in 1884 granted on a temporary settlement to the heirs of the zemindar, who was then dead, the rent being fixed at Rs. 860 a year. One of the heirs sold his share in the chuck to the plaintiff, and his share in the *ganti* tenure to another purchaser; but the defendant continued to pay the whole of the rent under the pottah of 1867 as before. That pottah contained a clause for the proportionate abatement if any part of the land was resumed. In a suit by the plaintiff suing alone for the rent of the chuck at the rate fixed in the settlement of 1884, the defendant denied his liability or any engagement to pay rent to the

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plaintiff. The High Court held that the suit was not maintainable on the ground that the purchaser of the share of the *ganti* tenure from the heir who parted with it had not been joined as a party. *Held*, that the resumption by Government did not disturb the possession either of the zemindar's heirs or of the defendant, and the rights of the latter were not abrogated by the settlement of 1884 so long as the zemindar or his heirs were in a position to let him have the land. The claim of the defendant for freedom from liability to the plaintiff in no way conflicted with s. 10 of Bengal Act VIII of 1879, which was plainly intended to fix for the future the liability of such under-tenants as might enter into possession, and under the circumstances did not interfere with the contractual rights of the subordinate holder. It was because the liability of the defendant was not under the settlement, but for a lump sum under the contract of 1867, that all the owners of the land for which the lump sum was the rent, were necessary parties in any action for the rent of the chuck in suit. Had the settlement created a liability against the defendant to pay Rs. 860 as rent to the plaintiff, the latter would not have required the concurrence of the owner of another and different chuck to enable him to maintain the suit. *PRIA NATH DAS v. RAMTARAN CHATTERJEE*, I. L. R. 30 Calc. ... 811

**Re-union.** *See* **HINDU LAW** ... 725**— of member after separation.** *See* **HINDU LAW** ... 738**Revenue.** *See* **SALE** ... 1**— Officer.** *See* **RES JUDICATA** 339

**— Sale—Act XI of 1859, s. 9—Act I of 1845—Mortgages—Part proprietor—Mortgage lien—Transfer of Property Act (IV of 1882) s. 72—Cesses—Personal decree—Contract Act (IX of 1872) s. 70—Mortgage—Civil Procedure Code (Act XIV of 1882) s. 578.**

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<b>Revenue Sale - concluded.</b>		<b>Review.</b> <i>See</i> SALE IN EXECUTION OF CERTIFICATE ...	619
A mortgagee of a share of an estate, who was also a part-proprietor, deposited in the Collectorate revenue and cesses payable by the defaulting mortgagor to save the property from being sold— <i>Held</i> , that on general principles, of justice, equity and good conscience, the mortgagee is entitled to have the amount paid by him on account of revenue added to the amount of the original lien. <i>Nayender Chunder Ghose v. Sreenuttu Kaminee Dosses</i> , 11 Moo. I. A. 241; 8 W. R. (P. C.) 17, relied upon; <i>Kinn Ram Dass v. Munsaffer Hossain Shaha</i> , I. L. R. 14 Calc. 80, distinguished. <i>Held</i> , also, that the mortgagee is entitled to a personal decree against the mortgagor for the amount paid on account of cesses, regard being had to s. 70 of the Contract Act (IX of 1872). <i>Smith v. Limonath Mookerjee</i> , I. L. R. 12 Calc. 213, referred to. <i>UPENDRA CHANDRA MITTER v. TARA PROBANNA MUKERJEE</i> , I. L. R. 30 Calc. ...	794	<b>Revision.</b> <i>See</i> JURISDICTION ...	112
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		Where a notice was issued under ss. 232 and 248 of the Civil Procedure Code for the execution of a decree and further proceedings were dropped until after the period allowed by limitation computed from the date of such decree:— <i>Held</i> , that there being no order made by the Court such notice alone did not operate as a revivor of the decree within the meaning of Art. 180, Sch. II of the Limitation Act. <i>Ashutosh Dutt v. Doorga Churn Chatterjee</i> , I. L. R. 6 Calc. 504, and <i>Suja Hossein v. Monohur Das</i> , I. L. R. 24 Calc. 244, discussed. <i>MONOHAR DAS v. FUTTER CHAND</i> , I. L. R. 30 Calc. ...	979
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**Rioting, Charge of—Conviction—Appeal—Acquittal—Convictions of house-trespass and hurt, legality of—Criminal Procedure Code (Act V of 1898) ss. 232 and 423—Penal Code (Act XLV of 1860) ss. 147, 323 and 448.**

The accused were convicted of rioting. That was the only charge before the Magistrate. On appeal the Sessions Judge acquitted them of rioting, but convicted them under ss. 448 and 323 of the Penal Code of house-trespass and hurt. *Held*, that the convictions by the Sessions Judge should be set aside, that the offences were distinct and separate offences, which should have formed the subject of separate charges, and that the accused had been prejudiced by the omission of those charges. *YAKUB ALI v. LETHU THAKUR*, I. L. R. 30 Calc. 288

**Riparian rights.** See EASEMENT 1077

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— Decree — Execution — Condition of sale—Title, abstract of, not corresponding with original—Setting aside sale, application for—Purchase-money, return of.

A purchaser of property at the Registrar's sale in execution of a mortgage decree accepted the conditions of sale, whereby he was required to furnish requisitions within 10 days after the actual delivery of the abstract of title. The purchaser did not furnish any requisition. On the 19th August 1899, by an order of the Court, the purchaser was to pay balance of the purchase-money into Court (he having already made deposit) without prejudice for his right to raise any question as to title or compensation. On the 31st August 1899 the purchaser paid the balance of the purchase money

**Sale—continued.**

under compliance of the order of the 19th August 1899. On the 28th April 1900 the purchaser applied for annulment of the sale or for compensation. On the 30th August 1900 the sale was set aside, but that order was reversed on appeal on the 28th February 1902. After the order of the 28th February 1902, the purchaser asked for inspection of the title-deeds in order to compare them with the abstract, and upon having certain Persian writing, which he discovered amongst them, read by an expert, found that the abstract of title did not correspond with the original documents of title. The purchaser then having applied to have the sale set aside and his purchase money refunded: *Held*, that the purchaser, though he had not furnished his requisitions within the time allowed by the conditions of sale, was not debarred from applying to the Court to set aside the sale on the ground that the abstract was incorrect and contained a material misdescription; and that he was, under the circumstances, entitled to have his purchase-money refunded. *In re Banister*, L. R. 12 Ch. D. 131; *M'Culloch v. Gregory*, 1 Kay & J. 286; *Else v. Else*, L. R. 13 Eq. 196; *Upendra Nath Mitter v. Obhoy Kuli Dassee*, 5 C. W. N. 593, referred to. *AGHOBE NATH MOOKERJEE v. ADMINISTRATOR-GENERAL OF BENGAL*, I. L. R. 30 Calc. ... 465

— Revenue — Suit—Act XI of 1959, ss. 5, 6, 7, 93—Bengal Act VII of 1868, s. 8—Certificate of sale—Onus of proof—Notice—Irregularity and illegality in form and service—Bengal Cess Act (IX of 1889) s. 53—Evidence Act (I of 1872) s. 114, cl. (e)—Presumption—Regulation VIII of 1819, ss. 8, 14.

In a suit to set aside a sale for arrears of revenue, the onus of proving that there has been irregularity or illegality in the preparation, service or posting of notice

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rests on the person who seeks to have the sale set aside. <i>Ashau-ullah Khan Bahadur v. Trilochan Bagchi</i> , I. L. R. 13 Calc. 197, and <i>Horro Doyal Roy Chowdhry v. Mahomed Gazi Chowdhry</i> , I. L. R. 19 Calc. 699, distinguished. The fact that the inadequacy of price fetched at the sale was the result of the irregularity complained of may be either established by direct evidence or inferred, when such inference is reasonable, from the nature of the irregularity and the extent of the inadequacy of price. In a sale for arrears of revenue, after the certificate of title has been issued to the purchaser, s. 8 of Bengal Act VII of 1868 will operate as a bar to a suit to set aside the sale on the ground of irregularity in serving and posting notices under s. 6 of Act XI of 1859. <i>Lala Mobaruk Lal v. The Secretary of State for India in Council</i> , I. L. R. 11 Calc. 230, and <i>Bal Mokoond Lall v. Jirjuddin Roy</i> , I. L. R. 9 Calc. 271, distinguished. Omission to serve notice under s. 7 of Act XI of 1859 can hardly render a sale for arrears of revenue liable to be annulled under s. 33 of that Act, especially after issue of the certificate of title to the purchaser. <i>Gobind Chandra Gangopadhyay v. Shirajunnissa Bibi</i> , 13 C. L. R. 1, and <i>Mahomed Ashar v. Raj Chunder Roy</i> , I. L. R. 21 Calc. 354, referred to. <i>SHROBUTON SINGH v. NET LOIL SAHU</i> , I. L. R. 30 Calc. ... 1	
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Public Demands Recovery Act is maintainable in the Civil Court. <i>Ram Taruck Hazra v. Dilwar Ali</i> , I. L. R. 29 Calc. 73, referred to. An order made by a Certificate Officer under s. 19 of Bengal Act I of 1895 is final only in the sense that it shall not be open to appeal as provided by s. 32 of that Act, but not in the sense that it shall not be open to review or revision by the Commissioner under s. 33 of the same Act. <i>Nasiruddin Khan v. Indronarayan Chowdhry</i> , B. L. R. Sup. Vol. 367; 5 W. R. 93, <i>Badaricharya v. Ramchandra Gopal Savant</i> , I. L. R. 19 Bom. 113, and <i>Ramsing v. Baba Kisan-sing</i> , I. L. R. 19 Bom., 116, relied upon. <i>MATANGINI DEBI v. GIRISH CHUNDER CHONGDAR</i> , I. L. R. 30 Calc. ... 619	
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Where a Joint-Magistrate who had been authorized by the District Magistrate to hear appeals under s. 407, cl. (2) of the Criminal Procedure Code, on appeal revoked a sanction to prosecute granted under s. 195 of the Code by an Assistant Magistrate exercising second class powers: Held, that	



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the existence of the special power which was conferred on him by the District Magistrate did not constitute the Joint-Magistrate the Court to which appeals ordinarily lay under s. 195, cl. (7) from a Magistrate exercising second-class powers, and that his order revoking the sanction must be set aside as having been made without jurisdiction. <i>SADHU LALL v. RAM CHURN PASI</i> , I. L. R. 30 Calc.	... 394
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The Inspector General of Registration, Bengal, wrote a letter to the District Registrar of Tippera directing the prosecution of a Sub-Registrar on charges under ss. 417 and 468 of the Penal Code. The Sub-Registrar was tried and convicted under s. <sup>468</sup> <sub>109</sub> of abetment of forgery for the purpose of cheating. At the trial it was contended on behalf of the accused that there could be no conviction for abetment when sanction had been given for prosecution for the substantive offence only:— <i>Held</i> , that the letter of the Inspector-General of Registration was a sufficient sanction to justify the conviction, and that no fresh sanction was necessary under s. 230 of the Criminal Procedure Code. <i>PROFULLA CHANDRA SEN v. EMPEROR</i> , I. L. R. 30 Calc.	... 905
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The words "offences involving a breach of the peace" in s. 110, cl. (e), of the Criminal Procedure Code, mean offences in which a breach of the peace is an ingredient and not offences provoking or likely to lead to a breach of the peace. Where a person, who was found by the Magistrate to be addicted to acts of immorality in attempting to seduce women and behaving indecently and immodestly towards them, was bound over to give security for good behaviour under s. 110, cl. (e), of the Code: <i>Held</i> , that the order for security should be set aside as the offences were not such as involved a breach of the peace within the meaning of that clause. <i>ARUN SAMANTA v. EMPEROR</i> , I. L. R. 30 Calc.	... 366
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Where a case which was being tried by a Deputy Magistrate, who was about to frame charges against the accused persons, was withdrawn by the District Magistrate to his own file and dismissed under s. 253 of the Criminal Procedure Code on the ground that the accused, who were policemen, were protected by their warrants:— <i>Held</i> , that the case ought to have been left with the Deputy Magistrate to be disposed of, and that it was for him to determine whether the offence charged was made out or whether the police were protected by their warrants. <i>GOPINATH PATNAIK v. NARAIN DAS BANERJEE</i> , I. L. R. 30 Calo.	... 693
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